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Supreme Court of the United States

OCTOBER TERM, 1905.

SOUTHERN PACIFIC COMPANY, ATCHISON, TOPEKA AND SANTA FE RAILWAY COMPANY, SANTA FE PACIFIC RAILROAD COMPANY and SOUTHERN CALIFORNIA RAILWAY COMPANY, *Appellants*, vs. THE INTERSTATE COMMERCE COMMISSION.	No. 159.
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ROBERT DUNLAP,
THOMAS J. NORTON,
Attorneys for Atchison, Topeka & Santa Fe Ry. Co.
Santa Fe Pacific Railroad Co. and
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GARDINER LATHROP,
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GARDINER LATHROP,
Counsel.

TABLE OF WITNESSES.

W. G. BARNWELL— Los Angeles. Assistant General Freight Agent, Santa Fe (279).

WM. A. BISSELL— San Francisco. Assistant Traffic Manager on the Coast of The Atchison, Topeka and Santa Fe Railway System, including The Atchison, Topeka and Santa Fe Railway Company, Southern California Railway Company and Santa Fe Pacific Railroad Company (862).

EDW. CHAMBERS— General Freight Agent of The Atchison, Topeka and Santa Fe Railway Company Coast Lines, with headquarters at Los Angeles (887).

P. J. DREHER— Manager San Antonio Fruit Exchange at Pomona, which shipped 5,000 cars up to 1903 and has $40,000 invested in orange groves (227).

E. T. EARL— President Continental Fruit Express, President Earl Fruit Company (152).

JAMES A. EVERIST— Riverside. Shipper of 50 to 75 carloads, with packing house on line of Santa Fe only (273).

W. G. FRASER— Riverside. Secretary Arlington Heights Fruit Company (857).

ARTHUR GREGORY— Redlands. Grower and shipper of citrus fruit (851). Also shipper of dried fruit, honey, nuts, etc. (856).

I. L. HIBBARD— Superintendent of the Southern California Railway Company from 1897 to 1903, and Superintendent of the Albuquerque Division (420 miles) of the Santa Fe Pacific Railroad Company and The Atchison, Topeka and Santa Fe Railway Company between Seligman, Arizona and Albuquerque, New Mexico (906).

LELAND LYON— Fruit grower and shipper (841).

SETH MARSHALL— San Bernardino. President Highland Orange Growers' Association (862).

C. E. MAUD— President Consolidated Forwarding Company (818).

CHAS.G.MCKINLEY—Secretary Orange County Fruit Exchange (840).

D. W. MCLEOD— Member Riverside Navel Orange Company, which is branch of Southern California Fruit Exchange (171). Handles about 200 cars annually (236), shipping through California Fruit Agency (242).

JAMES MILLS— Superintendent Arlington Heights Fruit Company (225).

E. S. MOULTON— Packer and shipper (859). Secretary Consolidated Forwarding Company, one of the two companies which began this litigation (13).

E. M. NADAL— Ex-employe Southern Pacific Company, who purloined from employer private documents. Running Traffic Bureau for prosecution of claims against railroads (331–2–3).

A. H. NAFTZGER— President and General Manager Southern California Fruit Exchange (one of the two organizations which began this litigation before the Commission p. 35) since its organization in 1895, the business of which is to market citrus fruits of twelve exchanges in seven counties in Southern California, representing in 1900 about 1,700 orange growers (pp. 158–9) and handling about 75 per cent. of Southern California output. All during 1895 and 1896 had charge and was President of Overland Fruit Despatch, a car company operating refrigerator cars particularly for Southern California Fruit Exchange (which held stock in Car Company, p. 810), of which he was President, and which refrigerated probably 1,000 cars (161). Ceased to operate Overland Fruit Despatch in the summer of 1897, because Southern Pacific and Santa Fe companies refused his request for renewal of contract, they claiming they had all cars they could use to advantage (162–3). His purpose in organizing Overland Fruit Despatch was to get mileage from Railway Companies and also profit from refrigeration, and he did get mileage sometimes as high as two cents a mile (813). Later Manager California Fruit Agency (979).

W. G. NEIMEYER— General Agent at Chicago of Southern Pacific Company in charge of handling citrus fruit diversions (965).

GEO. A. PARKYNS— Los Angeles. Assistant General Freight and Passenger Agent Southern Pacific.

O. L. RULE— Citrus fruit diversion clerk of Santa Fe at Los Angeles (971).

A. G. STEARNS— Shipper to the extent of 225 to 300 cars a year (254).

W. SPROULE— San Francisco. Freight Traffic Manager Southern Pacific Lines (281).

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APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF CALIFORNIA.

BRIEF AND ARGUMENT FOR APPELLANTS.

STATEMENT.

This is an appeal from a decree of the Circuit Court of the United States, Southern District of California, enjoining obedience on the part of the appellants to an order of the Interstate Commerce Commission, which decree was made in a suit instituted by the commission, under Section 16 of the Interstate Commerce Law, against all the appellants in said court.

The petition or bill in equity filed by the commission August 21, 1902, in said court, to enjoin obedience to its order made upon the two complaints, filed before said commission, one by the Consolidated Forwarding Company of California, and the other by the Southern California Fruit Exchange of California, has attached as exhibits thereto and as parts thereof copies of said complaints, the answers of the railway companies, the report of the commission, and its order founded thereon. (Transcript, pp. 8 to 85.)

The history of this proceeding in the light of the evidence and the facts found by the commission is remarkable. It appeared that for several years prior to 1900 large shippers of citrus fruit in southern California, notably the two complainants before the commission, were in the habit, either directly, or through the instrumentality of private car lines, of receiving rebates from eastern connections of the appellants, over whose lines shipments were routed generally by such private car lines. The matter became so intolerable that the appellants, who were initial carriers of this product, conceived the plan that as shipments to the east would have to be made under joint tariffs, if they could secure to themselves the right to route as a condition of making or continuing in effect such joint tariffs, they would be able to eradicate the evil by notifying their connections that thereafter they would see to the routing and that neither shippers nor private car lines could sell the same for rebates; that they would see that the shipments thereafter were not routed over lines which were found to be paying these unlawful rebates. They, therefore, succeeded in establishing as a part of the joint tariffs such a provision, which was made effective January 1, 1900. As found

by the commission, the payment of unlawful rebates then ceased.

The two complainants before the commission were shown to have largely profited by these illegal practices, and the enforcement of the routing provision cut off further opportunity for such profits. Thereupon, on March 3, 1900, they filed two complaints before the commission against the appellants, which complaints are identical in their charges. Therein they alleged that they were engaged in the business of handling and transporting from various points in southern California to eastern markets oranges, lemons and other fruits and products grown in southern California; that the Southern California Railway, the Santa Fe Pacific Railroad and the Atchison, Topeka & Santa Fe Railway constitute a through transcontinental railroad between National City and Chicago, with main and branch lines passing through Los Angeles and other points in southern California; that the Atchison Railway at Chicago and other intermediate points, makes connections with divers other railroads terminating at various eastern and Atlantic points; that the Southern Pacific Company operates a line of railroad between San Francisco, by way of Los Angeles and other points in the state, and El Paso, in Texas, to New Orleans, at which last-mentioned point and intermediate points it makes connections with divers and sundry lines of railroad terminating at various eastern and Atlantic points; that it also operates a line of railroad from Los Angeles, by way of Sacramento, and other points in California, to Ogden, at which point it makes connections with divers railroads between the City of Ogden and eastern and Atlantic points;

That the principal industry in southern California

is the growing and marketing of oranges, lemons and other fruits, the larger portion of which can only be disposed of in the eastern markets; that they require rapid transit and can only be transported in refrigerator cars; that defendants, disregarding their duty to furnish refrigerator cars, and for the purpose of giving the Continental Fruit Express, Edwin T. Earl, and the Earl Fruit Company an undue preference over complainants and other shippers, entered into certain contracts with the Continental Fruit Express to operate, for a term of years, over their line of railroad, certain refrigerator cars; also that contracts were entered into with the Santa Fe Refrigerator Line and Armour & Company to operate refrigerator cars, and this was done for the purpose of giving an undue preference over complainants and other shippers;

That defendants have refused to furnish complainants and other shippers other refrigerator cars, but have compelled them to use refrigerator cars furnished by the Continental Fruit Express, Santa Fe Refrigerator Line and Armour & Company;

That said private car lines are permitted by the railroad company to establish, in addition to the regular tariff established and published by the defendants, a refrigerator tariff, which was made a charge against shipments under refrigeration; that such tariff charges are largely in excess of the actual cost of refrigeration and yield large profits to the private car lines.

It is also charged on information that the Southern Pacific Company and the Atchison Company, for itself and the Santa Fe Pacific and the Southern California Railway Companies, prior to January 1, 1898, entered into an agreement and combination to pool and divide between said Southern Pacific Company and the de-

fendants, composing the Santa Fe System "the aggregate or net proceeds of the earnings of all the business done by any of said defendants, originating in southern California." That said agreement and combination is still in force.

It is then claimed that shippers had the right to select the route over connecting lines over which their shipments should be carried, but that for the purpose of carrying out and making effective the agreements with the private car lines and the aforesaid pooling compact between the Southern Pacific Company and the Santa Fe Company, defendants established a rule whereby the initial carrier reserved to itself the absolute and unqualified right of routing beyond its own terminal all shipments of citrus fruit in carload lots. (The rule referred to is a provision in joint tariffs made by the initial lines with all eastern connections, naming the flat freight rate of $1.25 per hundred pounds to all points in the United States east of the Missouri river, and giving as the condition thereof to the initial carriers the absolute and unqualified right to route over connecting lines.)

General complaint is made of delay in shipments and on information it is charged that by reason of the pooling agreement the several lines of railroad connecting with defendants' lines are promised and guaranteed by the initial line a proportion of the business or a division of the business, and that consequently all competition for the carriage of said products is destroyed, and the connecting carriers are not obliged to secure and hold the business by reason of good service.

Complaint is then made that while the volume of the traffic has increased and the market price of lemons

and oranges decreased there was no change made in the $1.25 per hundred-weight rate and that such rate was excessive. (Transcript, pp. 13 to 19 and 35 to 41.)

Answers were filed by the railroad companies denying the unlawful charges and setting up various matters, among others, that the routing provision was adopted to break up the unlawful practice of rebate paying by connecting lines. After taking a lot of testimony the commission made a decision holding the routing provision of the joint tariffs to be illegal, mainly on Section 6 of the law. (The lower court based its decision entirely on Section 5.) Upon the other questions involved they regarded the evidence *insufficient* to justify a decision or determination, and, therefore, three questions were reserved for further consideration and proof, viz.: First. Whether defendants pool their citrus fruit traffic or divide the earnings therefrom; Second: Whether the blanket rate of $1.25 per hundred pounds was unjust or unreasonable; and Third: Whether the statute applies to charges for refrigeration (See Transcript, pp. 55 to 77.) Mr. Commissioner Knapp dissented. (See his opinion, Transcript, pp. 77 to 83.) The findings of the commission will be referred to hereafter.

Thereupon the commission formulated the following general order, in substance requiring appellants to route all shipments as requested by shippers at the joint rate made in the joint tariffs but to desist from enforcing the condition or provision concerning routing, upon which the joint rate was made by such initial carriers. It is as follows (See transcript, pp. 83 to 84):

"The Consolidated Forwarding Company v. The Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company, The Santa Fe Pacific Railway Company, and The Southern California Railway Company,	No. 575.
The Southern California Fruit Exchange v. The Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company, The Santa Fe Pacific Railway Company, and The Southern California Railway Company,	No. 576.

This case being at issue upon complaint and answers on file, and having been duly heard and submitted by the parties, and the commission having, after due investigation, made and filed a report and opinion herein containing its findings of fact and conclusions thereon, which said report and opinion is hereby referred to and made a part of this order:

It is ordered and adjudged that the defendants, The Southern Pacific Company, The Atchison, Topeka and Santa Fe Railway Company, The Santa Fe Pacific Railway Company, and The Southern California Railway Company, be, and they severally are hereby, *notified and required* to wholly *cease and desist* from and after the twentieth day of June, 1902, from maintaining or enforcing a rule or regulation *whereby shippers of oranges, lemons, or other citrus fruits* from points in southern California to points on and east of the Missouri river and other eastern destinations are denied the right of designating for the transportation of their said property and having such property transported over any of the defendants' established and published joint or continuous lines or routes between any of the aforesaid points of shipment and destination at the published schedule rate or charge applying over such route or line.

It is further ordered and adjudged that said defendants, The Southern Pacific Company, The Santa Fe Pacific Railway Company, and The Southern Cali-

fornia Railway Company, be and they severally are hereby, *notified and required* to wholly *cease and desist* from and after the twentieth day of June, 1902, from failing and refusing as initial carriers to keep open for the *use of the public* their published rate or charge for the transportation of oranges, lemons, and other citrus fruits from points in Southern California to points on and east of the Missouri river, for and during all of the time such rate or charge may be lawfully in force, over each and every of the established routes upon which the said rate or charge is in their published joint schedules or tariffs stated to apply, and from further continuing their present practice whereby the application of such published rate or charge over any of such published established routes when specified by a shipper for the transportation of his property is allowed to or withheld from such shipper and the property shipped by him as they, the said defendants, or either of them, may determine.

And it is further ordered that a *notice* embodying this order be sent forthwith to each of said defendants, together with a copy of the report and opinion of the commission herein, *in conformity with the provisions of the fifteenth section of the Act to Regulate Commerce.*"

It appears from the testimony in the lower court that the provision in the joint tariff, effective July 20, 1903, and which superseded the provision in the tariff referred to in the report of the commission, reads as follows:

"The joint tariffs herein named are made and entered into upon the express condition that the initial carrier shall have and exercise the sole and exclusive right of routing all shipments under said joint rates beyond its terminus, as well as upon the other conditions, provisions and stipulations hereinafter set forth." (Transcript, pp. 357, 358 and 365.)

Defendants refusing to comply with the order of the

commission this suit was instituted to enforce obedience.

A table of witnesses is prefixed so that the court may be the better able to judge of the value of the testimony as in the statement of facts the name of the witness is cited in each instance. References in parentheses are to the top pages of the record.

A Startling Legal Conclusion.

In this case there is presented the anomaly of an implied indorsement and justification by the Interstate Commerce Commission and by the Circuit Court of the United States of one of the most open and gross systems of rebate-giving that has ever been known. (Rec., pp. 66, 1039.)

The commission found that a single shipper, the Southern California Fruit Exchange, one of the two organizations that began this litigation (35), had received in rebates from 1895 to 1899 the enormous sum of $174,491 (66 and 80); also (71) that for seven years previous to 1900 rebates had been generally paid by private car-line companies and by the eastern connections of these defendants from $15 to $25 a car; that the payment of rebates had been well known and had been generally made to all shippers when the car was refrigerated as well as when it was not, though the rebate was greater when refrigeration was used, the average rebate being $15 when the car was *not* refrigerated and $25 when it was; and *that the eastern connections of the defendants were willing to pay these rebates to have traffic routed over their lines.*

Notwithstanding this extraordinary and deplorable condition the commission, forgetting the provisions of Sections 6 and 10 of the law, the enforcement of which is imposed upon them as a special duty, gave this unlawful practice a quasi indorsement as follows (66):

"As the practice of paying these rebates was general the shippers came to regard them as a part of their legitimate returns from the orange business."

Again the commission said (71):

"Some of this money was paid by the car lines and some of it by eastern connections of the carriers, but however paid these allowances or rebates must be regarded as deductions from the amount paid for transportation."

In its conclusions the commission considered that the suppression by the initial carriers, under their assumption of the right to route the business beyond their termini, of the practice of rebate-giving had the effect to "hold up rates by unlawful methods." (75.)

In line with this strange reasoning the Circuit Court of the United States said (1039):

"But if there is in the present case any fact emphasized and made specially prominent by defendants it is that fierce rivalry existed between their eastern connections before their routing rule was adopted."

We shall show presently that this "fierce rivalry" consisted wholly in the cutting of the published tariffs on file with the commission and in the giving of rebates by the private car companies and the eastern connections of the defendants for the purpose of securing traffic.

Again the Circuit Court said in its opinion (1038):

"But it is said that under the present routing ar-

rangement the initial carriers look to efficiency of service in apportioning freights and there is competition in every respect except rate. The exception is fatal to the argument, because the prohibition of Section 5 against pooling freights protects competition in rate as well as in service."

The foregoing statement is erroneous in that it assumes that, because the initial carriers dictated the routing beyond their termini, the joint tariff rate of $1.25 on citrus fruit to all points east of the Rocky Mountains could not be altered. The fact is that the conditions respecting the tariff rate were exactly the same after the initial carriers assumed control of the routing on January 1, 1900, that they had been before. No eastern connection was capable, either before or after January, 1900, of publishing a rate from the Pacific Coast to points east of the Rocky Mountains. Such a tariff could be promulgated only by agreement. Before the routing rule was adopted either the Southern Pacific Company or the Atchison, Topeka and Santa Fe Railway System (commonly called the Santa Fe Company) could have made an agreement with eastern connections for a different tariff at a dollar rate. But that is true today and has been ever since the initial carriers took charge of the routing. There is absolutely not a syllable in the record to show any agreement or understanding to prevent the Santa Fe Company from promulgating with its eastern connections a joint tariff with a reduced rate; nor is there a syllable to show that the Southern Pacific Company has been since January, 1900, in any way bound not to promulgate with its eastern connections a tariff at a

reduced rate. On the contrary, it was positively testified (221) by W. B. Biddle, Traffic Manager of the Santa Fe at Chicago, that either the Santa Fe or the Southern Pacific was free to publish any tariff that it might choose to put out. And it remains a fact which cannot be gainsaid and which is a concrete refutation of the claim that there could not be a competition as to rate, that since the routing rule was put in force the citrus tariff was reduced from $1.25 to $1 on lemons (Biddle, 221; Barnwell, 454).

For all of the record the United States Circuit Court said again (1039):

"Since defendants' plan to maintain their rates through the operation of the routing rule necessarily involved the destruction of competition, it is idle to say that that result was not intended by them. The sole immediate aim of the routing rule was to put the shippers of citrus fruit in a position where their patronage could not possibly be competed for by defendants' eastern connections."

The only "destruction of competition" that resulted from the routing rule enforced by the Santa Fe Company and the Southern Pacific Company was the absolute abolition of rebate-giving by eastern connections and private car companies that were striving for the traffic. If that is lawful "competition," then the Interstate Commerce Law has been misunderstood and misinterpreted for 18 years. The initial carriers made the announcements to eastern connections that business would not be routed over any of their lines found violating the Interstate Commerce Law by cutting the published tariffs through the giving of rebates, and very naturally and logically those connections con-

cluded that further attempts to buy business by illegitimate methods would be futile.

Again the court says on the subject of "competition" (1049):

"The destruction of competition was not only inevitable from the rule but so plainly heralded by its terms that no gift of prophecy was needed to foretell the result."

Again it says (1040):

"The truth is, as testified by numerous witnesses, that the chief purpose of defendants in entering into this routing contract was to maintain the joint tariff rates."

Is not that a lawful purpose? And is it not unlawful not to maintain the joint tariff rates while in force? It was because the joint tariff rates had been cut by rebates with great discrimination to shippers, as we shall presently show, that the initial carriers published November 15, 1899 (455 *et seq.*), a joint tariff containing this provision:

"In guaranteeing the through rate named herein the absolute and unqualified right of routing beyond its own terminus is reserved to the initial carrier giving guaranty."

On January 1, 1900, another joint tariff was published containing the same provision (466 *et seq.*). The effect of the publication of these tariffs, as we shall hereafter more fully show, was immediately and completely to put an end to the giving of rebates, as the eastern connections of these defendants clearly saw that the traffic which they might attempt to secure by rebates would not be delivered to them.

In its opinion on the merits the Circuit Court said (1040):

"Established rates could not be maintained while defendants' eastern connections were able as competitors to directly approach shippers for their freights, and the routing rule was resorted to for the purpose of destroying that competition."

Why, in good conscience, should not "that competition" have been destroyed? Was it not the purpose of Congress in enacting the Interstate Commerce Law, and in amending and strengthening it, to destroy "that competition"? Was it not the country-wide complaint about "that competition" which caused the enactment of the statute? And is it not the complaint to-day about "that competition" which is moving Congress to further legislation?

Farther on in this statement we shall show that there was indeed competition of every lawful kind, and the only affect of the action of the initial carriers (defendants) was completely to wipe away an unlawful competition which had become a noxious stench in the traffic circles of the country.

We point out here the strange and startling theories of the Interstate Commerce Commission and of the Circuit Court respecting "competition" for the purpose of stating as a preface to the evidence which we are about to review that the claims made by them in the language quoted are not only unwarranted but also that they are directly contrary to the evidence produced.

A Few Facts Historical.

In 1886 these defendants and the Southern Pacific Company, upon the request of the growers and shippers of citrus fruits in Southern California, for the

purpose of nurturing a young industry, arranged with their eastern connections for a rate of $1.25 a hundred pounds on citrus fruits (oranges, lemons, grape fruit, etc.), from Southern California to all points east of the Rocky Mountains, the rate theretofore having been $1.50. The rate was made by mutual agreement of the carriers before the Interstate Commerce Law became effective and applies practically to every point in the Union. (Morton, 136.) The rate of $1.25 was very low and extended to the Atlantic seaboard to meet the importation of Mediterranean oranges against which at that time there was not sufficient duty, especially as the California orange production was not enough to hold the market against the Mediterranean orange. (Sproule, 941.)

Under this freight charge there has been developed in Southern California citrus fruit groves covering 88,000 acres (Dreher, 229), which is about all that the water supply will suport. (Sproule, 946.) Of the 88,000 acres about 27,000 are tributary to the Santa Fe and 27,000 to the Southern Pacific, the remaining 34,000 being served by both lines jointly. (Sproule, 946.)

The Santa Fe and the Southern Pacific have each about 350 miles of railroad in the citrus belt. (Chambers, 179; Sproule, 286.)

In 1885 only a few hundred carloads of citrus fruit were shipped to eastern points. In 1890 there were approximately 5,000 carloads and in 1898-9 the shipments were considerably over 15,000 carloads. (Naftzger, 159.)

Earl testified he invented a ventilator device and

applied it to some refrigerator cars in 1891, his object being to provide cars that would transport the Earl Fruit Company's product to destination in good condition. He arranged with the Santa Fe people, who were then building some refrigerator cars of an old pattern for the California business, to permit him to put his device into 100 of their cars at his expense, with the understanding that as far as possible the Earl Fruit Company should be allowed the use of the cars. The cars came to California in January, 1891, and were immediately put to use carrying oranges. It was soon demonstrated that the car was a complete success and that it overcame the difficulties shippers had contended with for years. All shippers wanted the car. He concluded in view of the demand to build some cars and own them, but when he put this conclusion into effect and endeavored to arrange with the California railroads they demanded that the cars should be furnished to all shippers on equal terms. That meant that instead of building 200 or 300 cars for the business of the Earl Fruit Company he should have to furnish 1,000 or more. He then incorporated the Continental Fruit Express for the building of cars and engaged in the business on a large scale, soon having 1,500 cars in operation. (Earl, 843-4.)

The conditions in the citrus traffic had been growing worse with respect to rebates until in 1899 it had become intolerable. At first certain roads that had not been sharing in the orange business by reason of their location came into Southern California and offered shippers a certain number of dollars per car for every car that would be routed over their roads. The effect was to divert the business from the lines that had for-

merly been getting it and which were in the natural direction that the traffic would take, being the lines that could render the most direct service and lines with which arrangements had been made to refrigerate cars. In these circumstances the car line companies determined to go in and control the movement themselves and secure for their respective cars a share of the traffic. (Sproule, 914-5.)

The private car companies received from the connections of the defendants a certain rate of mileage for cars routed over such connections. The regular and prevailing car mileage paid by carriers hauling other than their own equipment was secretly increased to these car companies by certain eastern connections in consideration that the business would be routed their way. From this mileage and from the secret excess mileage thus allowed the car companies had a fund which they employed to buy of the shippers the privilege of routing. In addition to the mileage mentioned the car companies received for icing $60 to Missouri River points, $75 to Chicago and $90 beyond. (Naftzger, 164.)

It will appear from the testimony hereafter reviewed that the transportation rates and the icing tariff were paid in full by shippers and that subsequently a part of these charges were returned in the form of rebates.

From these two sources the car companies procured enough money to acquire by purchase absolute dominion over the business, which they exercised with such effect and thrift that in 1899 there was not a carload of citrus fruit going out of Southern California upon which someone did not get a rake-off. (Sproule, 921.)

These rebates were not paid by any of the defendants. The defendants published with the commission a tariff and did everything in their power to have the law which it expressed respected. One of the very conditions which the Interstate Commerce law was intended to suppress, namely, the advantage which one shipper enjoyed to the prejudice of another, here existed in more than original rottenness. It was not costing any two shippers the same price to get citrus fruit to eastern markets. Many got no rebates at all, others got all they could secure, while a large percentage of most of the rebates went into the pockets of middlemen (828), who blandly testified without a blush that even where they had no interest at all in the fruit which they marketed they put the rebates in their pockets and gave to the men who toiled to grow the product not a dollar. (Maud, 823.)

This ulcer had been growing for many years.

The Atchison, Topeka and Santa Fe Railway Company, which was operating not only its own line, extending from Chicago to Albuquerque, but also as a part of its system the line of the Santa Fe Pacific Railroad Company, extending from Albuquerque westward to Barstow, California, and the line of the Southern California Railway Company, extending southward from Barstow into Southern California and the citrus region, is generally spoken of in the testimony as the Santa Fe. Although there are three defendants on this brief, the real and practically the only defendant, except the Southern Pacific, is The Atchison, Topeka and Santa Fe Railway Company.

The Southern Pacific Company has a line extending from Los Angeles and other Southern California

points northward to San Francisco and Sacramento and thence eastward to Ogden, Utah; and also another line from Los Angeles and Southern California points eastward to El Paso, Texas. The Santa Fe Company and the Southern Pacific Company were the only railway carriers out of the citrus region.

About 60 per cent. of the citrus traffic went to points east of Chicago and therefore, everything else being equal, the Santa Fe should have had the entire haul to Chicago on all business originating on its line and destined to Chicago or beyond. But under the rebate system connections going out to Albuquerque, El Paso, Pueblo, Denver, Burton in Kansas, Kansas City and other junction points purchased the traffic by means of rebates and took it from the rails of the Santa Fe, notwithstanding that its route to Chicago was the most direct. The practice was even carried so far that business originating on the Santa Fe rails in California never went upon that line at all, but was carried instead north to Ogden or southward to El Paso because the connections purchasing traffic at those Southern Pacific points were bidding higher than those at Santa Fe junction points. This was not only depriving the Santa Fe of business to which it was justly entitled and which by a special rate to eastern markets it had greatly helped to nurture and develop, but it was also taking off the rails of the Santa Fe its own equipment specially constructed and purchased for this business, putting it into the care of stranger lines which paid little attention as to whether the empty cars were ever returned.

The effect upon the Southern Pacific was similar, business which originated on its line being taken from

it before the haul to which it was entitled was complete and the special equipment which it had provided being scattered beyond its control throughout the United States.

In this situation the Santa Fe and the Southern Pacific Companies, after having fruitlessly tried all other means to suppress the rebate iniquity, decided upon the plan of revoking the existing joint tariff and publishing a new one containing the provision that the through joint rate of $1.25 was given and guaranteed upon the condition that the initial carrier should specify the route the car would take, the intention being, as it was announced to eastern connections, to withhold the traffic from any connection that should be discovered giving rebates. Before this tariff was put out in November, 1899 (to take effect January 1, 1900), the eastern connections were informed of what was coming and were told that no carrier would be made a party to the joint tariff until it had given its assent to the arrangement. As was expected, all the connections were glad to be ridded of the system of paying toll to intermediaries under which they had been laboring. Moreover, any connecting carrier that might have been disposed to continue paying rebates well knew that there was no certainty of its getting what it might buy. Therefore it did not buy. The rebate plague disappeared instantly and absolutely; and it will have disappeared forever if this court will declare the proposition that as carriers are under no obligation to publish joint tariffs, their entering into such a joint agreement may be made upon terms, especially where it is open to the shipper to accept the terms of the joint tariff or ship under other tariffs.

Very promptly, on March 3, 1900, the California Fruit Exchange, whose president and general manager, Mr. Naftzger, testified (814) that he had received from $2,000 to $3,000 a month in rebates, and whom the Commission found (66) to have received in four years $175,000, and who stated on the witness stand (858) that whether any of the money that he got as rebates did not pass beyond his own pocket was none of the questioner's business, and who refused as a witness (859) to answer as to how much "graft" he really did get—filed a complaint as heretofore stated (35) before the Interstate Commerce Commission against the Santa Fe and the Southern Pacific Companies.

On the same date, evincing equal promptitude, the Consolidated Forwarding Company, whose president, C. E. Maud, testified (832) that one of the reasons he wanted to route the fruit was that it yielded rebates; that his desire to get rebates to some extent weighed in his estimate of the value of the routing privilege (824); that he had sought rebates and that they had been tendered to him (828); that the middlemen got the rebates and not the man who grew the fruit (828), also filed a similar complaint (13) before the Commission against the Santa Fe and Southern Pacific Companies.

These complaints unfolded a long tale of woe to the effect that since the initial carriers had begun routing, which was within two months, the transit was slow, the journeys were roundabout, the icing facilities inadequate, that the special attention which the cars required in the way of ventilating and taking temperature was insufficient, that the charges for refrigeration were exhorbitant, that the initial carriers had combined

to pool between them the proceeds of the citrus traffic, and so on almost without end. Answers filed (41 *et seq.*) by the defendant companies denied the allegations stated.

Hearing was begun in the two cases, which were consolidated, at Los Angeles, on March 30, 1900. (10.) On April 19, 1902, the Commission made a report in writing setting forth its conclusions and findings of fact (55, *et seq.*) and making its order (83-4) requiring the defendants to cease and desist from enforcing the routing rule and practice.

It was stipulated in the suit in the lower court to enforce this order (146), that the complainant and the defendants might incorporate into the record such testimony as they might desire which had been heard by the commission; and thereafter many witnesses were examined, chiefly on behalf of the defendants.

On June 1, 1903, the court rendered an opinion (132 Fed., 829) on the final hearing (1024), in which it eliminated questions that had been considered by the commission and stated the issue for decision as follows (1034):

"The question here presented is not whether there was a tonnage pool between the connecting carriers to which the defendants, although they promoted its ends through the use of the routing rule, were not parties, as found by the commission (see my opinion herein on demurrer, 123 Fed. Rep., 602), nor whether there was a traffic pool between the defendants to which the connecting carriers were not parties, which was one of the issues—the commission, for lack of satisfactory evidence, retained for further investigation, but whether or not the routing provision which the evidence adduced on final hearing shows and the answers of the defendants admit to have been part of the agree-

ment between the defendants themselves and their eastern connections, and pursuant to which their subsequent joint tariffs were filed with the commission, is itself a contract or combination for the pooling of freights."

The court reached the conclusion (1046) "that the routing contract here in controversy does so apportion freights among the defendants' eastern connections and is essentially such a pool."

Thereupon the defendants filed a motion for a supersedeas and asked that the injunction be suspended pending appeal (1062), which motion was denied. (1063.) Accordingly, the defendants jointly and each of them separately perfected appeals to the Supreme Court of the United States. (1064 *et seq.*) Assignments of error were filed (1071 *et seq.*) by each of the defendants.

For the convenience of the court we shall state pretty fully the substance of the evidence on the various matters.

The Rebate Scandal.

Under this heading we purpose to show:

1. That before the initial carriers assumed control of the routing the giving of rebates was open, notorious and discriminatory, small shippers being the worst sufferers.

2. That the sole purpose of the initial carriers was to put an end to this unlawful and discriminatory practice.

3. That the practice was quickly and completely stopped, placing all of the shippers on the same footing, as soon as the initial carriers assumed the right to route.

FIRST.

As showing that before the initial carriers took control of the routing the giving of rebates was open, notorious and discriminatory, and the small shippers were the worst sufferers, we will appeal to the record.

The commission found from the testimony that rebates had been paid for a period of at least seven years previous to 1900, amounting generally to from $15 to $25 a car, some of the money being paid by the private car line companies and some by eastern connections of the initial carriers, the defendants. (71.)

It was also found that the average rebate was $15 when the car was not refrigerated and $25 when it was under ice, and that the eastern connections of the defendants were willing to pay rebates, or their shares of them, to have traffic routed over their lines. (66.)

It was also found that one of the complainants that began this proceeding before the commission had received in illicit rebates during four years $175,000. (80.)

The rebate varied from $10 to $40 a car. The effect of rebate-giving was that it diverted from the Santa Fe lines to the lines of connections offering rebates traffic which the Santa Fe would otherwise have had. (Morton, 120-1.)

After making the best terms they could with the shippers for a consideration the car line companies went to connecting carriers and sold the business to the highest bidder. (Morton, 122.)

A. H. Naftzger, president and manager of the South-

ern California Fruit Exchange, one of the two companies which instituted this proceeding before the commission, gave some decidedly interesting testimony:

Prior to 1899 I do not think the tariff rates for refrigeration were very stiff. There was usually an opportunity to get something on the side. So far as we (the Southern California Fruit Exchange) were concerned I do not think we ever paid tariff on refrigeration. We received all the way from 10 to 25 per cent. discount on the refrigeration price of the car line company. I do not mean discount on the railroad tariff but on the refrigeration. All the car lines we ever used in our business made these allowances. (Naftzgar, 165.) The allowances were variable, ranging from 10 to 25 per cent. on the refrigeration rates. We paid for refrigeration $60, $75 and $90 in addition to the regular railroad tariffs and on this refrigeration charge we received the discounts mentioned, not on the railroad tariff. These rebates were made by all the car lines in the business. (Naftzger, 803-4.) We paid the full refrigeration tariff and then got back a rebate. (Naftzger, 806.) We had an understanding with the car line companies and made the best arrangement we could to get rebates. (Naftzger, 807.) Part of the time the car line companies said that if we would allow the business to go over certain lines they would give us a wider range and allow us so much more. (Naftzger, 808.) The practice of giving rebates dates back to my first experience along in 1892 and it has been in vogue until now (1900). The fixing of the rebates at 10, 15 and 25 per cent. of the icing charges was done through the bearing down qualities of the man who was getting it, I suppose. There was no uniformity about it. It was not an open reduction. Pretty nearly everybody got it that went after it. I always did. (Naftzger, 811.)

There was a larger allowance on the long hauls than on the short hauls; it was not a percentage; it was generally an even proposition of $5, $10 or $15, as the case might be, on a car. It was arranged through

an understanding with the car line companies at the beginning of the season that the use of those particular cars would secure that allowance on refrigeration, the understanding being between the shipper and the car line. It was not taken off the freight that was paid; it was in the shape of a refund after the refrigeration had been paid to the car line company. That was the only way to be done and not make an open reduction. In that way it was not known to all shippers and some of them got caught on the full rate, I presume. I suppose the car line companies did not want all shippers to know it because they did not want to give up if they did not have to. Secrecy was always enjoined by the car lines and generally it was a confidential proposition, the car lines paid the money back. The railroads did not have anything to do with it so far as the shipper was concerned, no matter what road it went over. (Naftzger, 812.)

Although the car line companies paid the rebates some of them would pay more back of the shipments traveled over certain lines. That usually had relation to connecting lines, not the initial lines. The *car company dictated the terms to the eastern connections to a certain extent*, I presume. (Naftzger, 813.) One of the advantages in our controlling the routing was in having shipments go over lines that would pay a cent a mile each way instead of over roads that would pay only three-quarters of a cent a mile. (Naftzger, 814.)

I think we sometimes received in rebates $2,000 or $3,000 a month. We *got rebates even where there was no refrigeration, but I never inquired where the money came from.* We got two cents a mile whether refrigerated or not and it came in every case from the car company. I cannot say that we ever received anything from a railroad company. (Naftzger, 814.)

I *have not any books that will show this because these were not accounts that we were interested in as a relic.* (Naftzger, 816.)

The rebates paid to me were turned over to the various fruit exchanges which I represented. (Naftzger, 817.)

Practically during all of the last five years rebates were paid by the different car line companies as I have described where there was no refrigeration as well as where there was. (Naftzger, 817.)

"Q. Have you ever got any money as rebates that did not pass beyond your own pocket?

"A. None of your business, sir. (Naftzger, 858.)

"Q. Mr. Naftzger, I will ask you if you have now told us fully and made a complete disclosure of all remuneration or money that has come to you from Mr. McIntosh, directly or indirectly, by reason of any car line transaction whatever?

"Q. Why do you hesitate?

"A. No; I have not.

"Q. What else was there?

"A. I do not intend to tell.

"Q. You refuse to answer?

"A. You can put it that way if you like." (Naftzger, 859.)

C. E. Maud, president of the Consolidated Forwarding Company, the company which joined with the Southern California Fruit Exchange in the institution of these proceedings before the commission, was also an interesting witness:

As long as I have been in the business there has been a refund by the car line companies averaging from a small percentage up to 25 per cent. of the refrigeration charges. It might be a flat rate of $15 a car on an average, the maximum being $35 and the minimum $5, to the Atlantic seaboard $35 being allowed. Allowances of rebates were made by eastern exchange, which I received by letter. (Maud, 818.)

From some of the companies I received rebates in person. I received rebates from the Continental Fruit Express, from Mr. Earl. (Maud, 819.)

One of the reasons that we want to route the fruit is that it gives rebates. (Maud, 823.)

The desire to get rebates to some extent has weight in our estimate of the value of the routing privilege. (Maud, 824.) We got rebates prior to the time that the carriers took charge of the routing. (Maud, 825.)

I made no objection to the Earl Fruit Company as a shipper as long as I got rebates, and the idea that Earl had an undue advantage over the rest of us came into my head after the rebates were cut off. Then I sat down and wrote the letter to Mr. Ripley. (Maud, 826.)

I got a rebate of $15 on cars that were not iced and $30 on refrigerated cars. I never received any rebate from a railroad company. I sought rebates and they were tendered to me. *The middlemen get the rebate and not the man who grows the fruit.* (Maud, 828.)

Stearns testified:

Before the routing was taken in hand by the initial carriers we used to have a call once or twice a week from representatives of the various lines soliciting us to send our business over their lines. (Stearns, 267.)

Everist testified:

Before the carriers took charge of the routing I had an intimation that I could obtain rebates from a party who would work the scheme for me. (Everist, 277.) Agents of eastern connections of the Santa Fe and the Southern Pacific used to call on us and urge us to ship freight over their lines. (Everist, 274.) At the time I knew there were a great many that were getting rebates. (Everist, 278.)

Westfall testified:

We paid a flat rate of $50 for refrigeration to the Atlantic seaboard and we received rebates from this. (Westfall, 829.) Mr. Hosbury, of the Toledo, St. Louis and Kansas City Railroad acted as our traffic manager and made arrangements for us with the Continental Fruit Express for refrigerator cars from time to time. While this arrangement existed we received moneys from Mr. Hosbury or the car company. He stated to us that he was in a better position to secure rebates from the car lines; recognizing his ability to do that, we employed him as traffic manager. We received moneys presumably from the car lines

through Mr. Hosbury. We received rebates from the Armour Car Line and from the Fruit Grower's Express. The maximum was $25 and the minimum $10 a car. To the Atlantic seaboard $25 and to such as Colorado points, $10. The rebate was received whether the car was refrigerated or not, and most of the time we got the same rebate regardless of refrigeration. (Westfall, 830.) I think we received several thousand dollars from Mr. Hosbury. *We sought the rebates so as to be on equal terms with competitors.* We sent out between 800 and 1,000 cars during the arrangement with Hosbury and the average was from $15 to $17.50 a car. (Westfall, 831.)

Hosbury never represented anybody but himself to me, although I believe he was a livestock agent of the Clover Leaf. *I paid him no salary as our traffic manager. I presume he considered the privilege of making the route over which our cars should pass to be sufficient for his trouble.* (Westfall, 831.) The rebates were paid in checks or drafts. They passed personally between Mr. Hosbury and myself, being handed to me by him. They were drawn on a Toledo bank. (Westfall, 832.)

Fay testified:

The private car lines have been accustomed to make rebates to me for refrigeration tariff, varying in different years and to different points. Last year it was $25 per car all around on refrigeration. On fruit not under refrigeration it varied from $10 to $25, I believe. (Fay, 833.)

We sought the rebates so as to have equal rights with our competitors. I understand that the rebate I was getting was an open rate to most every one. I never refused to receive more than my competitors. I got as large a rebate as I could without regard to what anybody else was getting. *I never turned these rebates over to the shipper. I kept them.* (Fay, 834.)

When I shipped the fruit of others I kept the rebates and charged the shipper the full rate. Last year (1899) we got rebates on 1,200 cars on account of

orange shipments, and on the lemons, averaging about $17.50 the car. (Fay, 838.) We paid no more to the people from whom we bought fruit when we got rebates than we do now when we do not get them. (Fay, 839.)

Lyon testified:

I never believed that the car line companies gave us all the rebate there was in it at times. We did not give the grower all the benefit of the rebate. *We got rebates from a man named Hosbury, who was a livestock agent of the Clover Leaf Company. That road is not a direct road in the sense of being the shortest.* (Lyon, 842-3.)

Earl, testified:—

Some rebates were made to some of the shippers by the Continental Fruit Express in consideration of their using those cars and not routing them over lines where they would get lost and cause the car company to lose mileage and time. The allowance was $10 or probably $15 to Chicago and $20 to the Atlantic seaboard. (Earl, 846.) We were forced to give allowances on account of competition of other car lines. Others did it and we were compelled to meet it. It would not have been given up except under pressure. (Earl, 846.) There was a demoralizing warfare between the car lines. There were patents pending and there was bitter feeling and they resorted to all manner of means to hurt each other and we gave up to the shippers in order to keep our cars moving $15 a car, so it came out of our revenue. We gave about $15 a car when we were getting $25 mileage. (Earl, 847.)

I cannot designate from my own knowledge any railroad that paid rebates to my car line within the last year except the Clover Leaf, represented by Hosbury. (Earl, 847.) We paid rebates out of our earnings of which there were several sources. I could not say whether it was from refrigerator charges or mileage charges. (Earl, 848.) Neither the Earl Fruit Company nor the Continental Fruit Express received

any mileage or rebates from the Southern Pacific Company, nor did they from the Santa Fe. (Earl, 848.)

Gregory, testified:—

Some of the car line companies offered me rebates and some did not. I accepted some and others I refused because they were not enough. (Gregory, 851.) I paid the full refrigerator charges and got a rebate from the car lines amounting to from $10 to $25. I got rebates from all the car lines. (Gregory, 852.) Last year (1898-9), my rebates amounted to about $3,000. (Gregory, 853.)

The railroad companies here did not pay rebates. (Marshall, 862.)

Bissell, testified:—

The car line companies paid rebates to everybody that did business. (Bissell, 865.) Before we took charge of the routing rebates paid to New York were about $35 a car from Los Angles, *the eastern lines giving up about* $15 *of that.* (Bissell, 878.)

Chambers, testified:—

Rebates were generally paid prior to January, 1900, by the car line companies to shippers. The plan of the car line companies was to get an excess mileage from connecting lines. The standard mileage was ¾ of a cent west of Albuquerque and one cent east of Albuquerque. The car line companies would arrange with our connections to pay a cent and a half a mile and agree in consideration that they would give those carriers a certain amount of the business, and out of that excess mileage allowances they would pay the shipper rebates. (Chambers, 890.) It was the policy of the Santa Fe System not to pay rebates, and it started out to do business that way, but it was finally obliged to lease its cars to a car line company. (Chambers, 892.)

In the development of the rebate practice it settled down to this, that the rebating was done through pri-

vate car lines. (Chambers, 898.) The payment of rebates previous to 1900 went back as far as 1887. (Chambers, 903.)

Sproule, testified:—

From the beginning the Southern Pacific declined to participate in rebate giving and our answer to our connections was that we would not join in this illicit work which we had from the beginning contended against and had used our efforts to avoid, and that we would not begin to violate the law. We therefore called our immediate connections to join us in a conference for the purpose of devising some plan of restoring rate conditions. We undertook to issue tariffs under which we would act upon our right to route. We told our immediate connections that we had called them into conference but that we contemplated action anyway and we wanted them to fully understand it so that they would not feel that there was any attempt on our part arbitrarily to change the channel of business. (Sproule, 917-8.)

By 1899 the demoralization had spread so that there was not a line handling oranges except the line that would pay those rebates, whether by the car mileage *or other device.* It can be laid down that every road east of Ogden, El Paso, and Albuquerque that was handling oranges was being bled. (Sproule, 918.)

On the condition that existed the Circuit Court of the United States said (1025):

"Prior to said agreement the keen rivalry existing between defendants' eastern connections led to a far-reaching system of rebates which was violative of the Commerce Act and cannot be too strongly reprobated."

SECOND.

We now take up the purpose of the Santa Fe and the Southern Pacific Companies, the initial carriers, in assuming control of the routing.

"We were determined to break up the practice which we believed they had indulged in of selling the business handled in those cars to our eastern connections, and this we could only do by taking the routing into our own hands, and notifying all such connections that any contracts or concessions made with or to the owners of these cars would be valueless, since we should pay no attention to routings. * * *

You ask why we select the citrus industry alone in exercising our right to route freight for which we accept the responsibility as to through rates. The answer is that the right is one which we do not care to exercise except for our own protection, and for the general good morals on the part of both carrier and shipper; and should circumstances arise which should inject into other business the same conditions that have heretofore existed as to the citrus business, we should unquestionably desire to exercise our rights as to such other business. At the present time there seems to be no necessity for so doing." (Letter of President E. P. Ripley of Santa Fe Company to C. E. Maud, introduced as evidence before the commission by complainants." (821-2.)

Shippers in Southern California who did not get the full benefit of a division of the rebates from Mr. Earl and others were naturally indignant, and it was to prevent that state of affairs solely and for no other reason in the world than to maintain legal rates that we took the routing of the business into our own hands. (Morton, 122.)

Just after the action was taken by us on the routing we had a meeting of the citrus fruit people of

Southern California and we told them then that we thought this change in the routing was the beginning of the end of the private car lines which were so distasteful to the people of Southern California, and the fact that Mr. Earl a year afterwards sold out proved that we were correct in the premises. (Morton, 129.)

Our exercising the right of routing was not for the purpose of dividing traffic and had no reference to that whatever. The reason of it was to maintain the legal rates. Another reason was to control the refrigerator cars, as we had been having a great deal of trouble in getting them returned from certain lines, and for that reason we never could tell how many cars we needed to handle the traffic, because we could not approximate how long it would take to have them returned, it being difficult to get the eastern roads to bring back empties, especially if they were crowded with traffic. Now if we find a line not returning cars promptly we take the business away from it. Our connections know that the matter is in our hands and that to get the business they must be prompt. (Chambers, 209.)

We exercised the right of routing in the interest of the small shipper and in the interest of not having any discriminations. (Morton, 127.)

We reserved the right to route on January, 1900, to put an end to irregularities and the giving of rebates which had been existing. (Barnwell, 440.)

While the amount of traffic that might be returned by a connecting line was considered in the distribution to connections, it was not to any extent. (Barnwell, 448.)

I had to do with the initial carriers assuming control of the routing of citrus fruit. The payment of rebates had got to such a pass that it was necessary for us to do something to protect all the companies interested. I had interviews with the representatives of some of the eastern lines to see if something could not be done to straighten the matter out. Though all expressed themselves as very much dissatisfied with existing conditions, it was the same old story, each one was afraid of the other and afraid that if it stopped giving rebates on the business it would not get any of it. They said that they would be very much pleased to have us take charge of the routing. That was in 1899. I talked with Captain Kramer of the Lake Shore, with Mr. Mitchell of the Michigan Central, Mr. Bigelow of the B. & O., and Mr. Shane of the Erie. *I suggested that if the initial carriers exercised their right to control this freight it would do away with the payment of rebates and would relieve them from the tribute that was being exacted by the car line companies, for the reason that there would be no inducement to pay rebates because they could not tell whether they would get the business though they agreed to pay for it. That is, they might agree to pay rebates on certain business and then it might move over other lines.* By the car lines I mean the owners of private refrigerator cars who were operating on the Santa Fe and the Southern Pacific. They paid the rebates. (Bissell, 863-4.)

The private car companies had been free to make any arrangements with the connections of the Santa Fe and the Southern Pacific at any junction point,

and the natural result was that as such rebates grew in volume the Santa Fe was deprived of the long haul, business being diverted from its line at Kansas City, for instance, or at Pueblo, instead of going through to Chicago. (Bissell, 865.)

A great deal of business left our rails at Kansas City and some left them at Burton on the Frisco. Some left at Denver to go by way of Omaha, and this notwithstanding that the shipments were destined for Chicago, reached by Santa Fe rails. (Bissell, 866.) *In many instances shipments left our rails for destinations reached by us more directly than the roads the shipments took.* (Bissell, 867.)

Another reason that we wanted to control the routing was that our cars were scattered. The special equipment was being scattered over roundabout roads and to lines with which we did not do much business, making delays in the return of the cars for eastbound fruit traffic. Such roads lacked ability to get loads for the cars at Kansas City and Burton, necessitating the haul of empty cars back, when, if they had been delivered to us at Chicago, we could in quite a number of instances have got them loaded back here to the orange fields. (Bissell, 867.)

There seemed to be an idea that the car line companies were exempt from the Interstate Law, which provides imprisonment for railroad men giving rebates, and we had to arrange to do business through an outside car line. We deemed this necessary to hold the business which we thought rightfully belonged to us. The conditions were very unsatisfactory to the

initial lines and also to the connections. (Bissell, 868.)

I frequently talked the matter over with eastern connections, and we came to the conclusion that we would route the business; and in pursuance thereof, in December, 1899, Mr. Sproule, representing the Southern Pacific, and I, representing the Santa Fe, notified the Erie, Grand Trunk, Lake Shore, and a dozen other leading eastern lines, that after January 1 we would route the citrus traffic, and that if they had made any special arrangements looking to the control of the business, through car line companies or otherwise, the results that they expected could not be obtained and that we suggested the cancellation of such arrangements. (Bissell, 869-70.)

To this announcement we received from the traffic departments of the different connecting companies the replies shown from page 870 to 872 of the record.

On October 9, 1899, R. H. Countiss, for the transcontinental lines represented in the freight bureau, sent out a circular letter which went to all connecting carriers that "to effectively promote the observance of the Interstate Commerce Act" a tariff would be made with roads giving the assurance that "they will not deviate from the rates provided therein, directly or indirectly, by any method or device, whether in conjunction with carriers, shippers, consignees, or car lines," and that the tariff should bear the following provision:

"In guaranteeing rates the absolute and unqualified right of routing beyond its own terminal is reserved to the initial carrier giving the guaranty."

It further stated that an indefinite or evasive response would be considered as indicating unwillingness to give the desired assurance." (875.)

When the circular was sent out a few of the connecting roads did not respond and they were left off the tariff of November, 1899. They subsequently came in on a tariff issued in January, 1900. (Bissell, 875-6.)

Our object in taking control of the routing was to be relieved of the dangerous practices that were in vogue, to obtain control of our own equipment or the equipment that was assigned to our line, and to enable us to get a fair compensation for the services that we were performing without violating the law either directly or indirectly. (Bissell, 876.)

Our sole object—and there was nothing beyond that—was to prevent the giving of rebates and to maintain the lawful published tariffs. (Bissell, 878.)

In no other business going out of Southern California was there such a necessity for action with respect to routing as there was regarding the citrus fruit business. (Sproule, 931.) If the same necessity would arise with respect to other commodities the railroad company would exercise the right if it felt that to be the only remedy. (Sproule, 932.) The demoralization of the citrus business under rebating has not entered into any other business. (Sproule, 933.)

I recommended to Mr. Bissell that we take control of the routing, and our sole purpose was to stop the giving of rebates. It was my judgment that it was the only way it could be stopped, as we had tried various ways before. (Chambers, 893.)

Our taking charge of the routing was in absolute

good faith and to prevent the payment of rebates and put all shippers on an equality, large and small. There had been a great deal of complaint to myself and other of the officers that certain large shippers were getting greater rebates than the smaller ones. (Chambers, 894.)

The conditions in the citrus traffic had been growing worse with respect to rebates until 1898 it became very serious and in 1899 it became intolerable. At first certain roads that had not been sharing in the orange business by reason of their location came into Southern California and offered shippers a certain number of dollars per car for every car they would send over their road. The effect was to divert the business from the lines that had formerly been getting it and which were in the natural direction that the traffic would take. Moreover, the cars could not be got back with expedition as the roads that gave the rebate to get the business did not have the same interest to get the cars back that they had to get the revenue loads. (Sproule, 914-5.)

Under the rebate practice the cars were returned the same as other empties, which was entirely ineffective for our purpose, the business being done on a basis that caused the roads handling it to feel that they were not warranted in giving empties proper service. (Sproule, 916.)

When it got to paying $35 *and* $45 *a car refunds on oranges to New York, it reached a point where some of the roads went out of the business because they said they could not afford to be bled any longer. Other*

roads insisted upon our protecting them against what they termed blackmail. (Sproule, 917.)

From the beginning the Southern Pacific declined to participate in rebates and our answer to our connections was that we would not join in this illicit work.

We therefore called upon our immediate connections to join us in a conference for the purpose of devising some plan of restoring rate conditions. (Sproule, 917-8.)

In 1899 I doubt whether there was any carload of citrus fruit that moved out of California without somebody getting a rake-off on it, although the shipper himself may not have got it at all. (Sproule, 921.)

THIRD.

That the practice of giving rebates was quickly and completely stopped, placing all shippers on the same footing, is shown by the record.

The commission found as follows (66):

"The payment of these rebates was discontinued January 1, 1900, and there is no evidence that the practice has been resumed."

In his dissenting opinion Chairman Knapp said (80):

"When routing was denied to the shippers, on January 1, 1900, these rebates had entirely ceased, and have not since been resumed. No explanation was offered to modify the natural inference from these admitted facts. They illumine the case beyond the need of comment. * * * In my judgment the commission should not seek to enforce a rule of conduct which, as experience shows, may aid illegal practices, unless clearly convinced that the provision in question so requires.

If the sixth section permits a construction, as I am confident it does, which lessens inducement and opportunity for offensive wrong doing, that construction should be adopted; and if the commission has any discretion in the premises, as I think it has, its discretion ought not to be exercised in favor of the confessed beneficiaries of criminal transactions." (80.)

The effect of the routing rule was to stop rebates and secret cutting of the published tariff definitely, fully, and absolutely. In answer to the query in the opinion of the Interstate Commerce Commission as to how this would result it may be said that every connection was given to understand that in case it was found offering concessions for citrus fruit business after January 1, 1900, we would see to it that business was diverted from its line; and I remember going so far as to say that if I found anybody cutting our rates secretly we would not only divert the citrus business from it but would also take away other business. (Morton, 127.)

Our sole purpose in routing was to maintain the rates. (Morton, 125.) *I want to add that the chief reason or chief objection on the part of the shippers to our taking the routing in our own hands was that they were no longer able to sell the business and get rebates. They admitted this privately to us.* (Morton, 122-3.)

The eastern connections recognized that rates had been badly demoralized and on our assurance that there would be a fair division of business with connections they entered into the joint tariff. We made it a forerunner in adopting the tariff with them, and it was distinctly understood that the absence of that consent meant that the name of that company would be left off the tariff. (Morton, 123.) Just after we took charge of the routing we told the citrus fruit people of Southern California that it was the beginning of the end of the private car lines which were so very distasteful to them, and the fact that Mr. Earl a year afterwards sold out proved that we were correct. Since January 1, 1900, the private car ownership has been

eliminated, and one shipper has had the same rate that others have had. (Morton, 128-9.) *The routing by the carriers has certainly made an equality of rates. It has given the small shipper a chance to grow. It has taken away from the large shipper any advantage.* (Morton, 130.)

During the last three years (since January, 1900), the rates have been absolutely maintained and I know of no rebates having been paid in the three years by the Santa Fe or any other road. (Chambers, 202.)

The effect of the routing rule has not been to take away the deliveries we want. We get them on request. (McLeod, 253.)

I do not know that the effect of the routing rule by the carriers has worked any hardship to me. (Stearns, 255.)

Since January 1, 1900, there has not been to my knowledge any payment of any rebates, or drawbacks, or any compensation by any railroad companies for the transportation of fruit to any shipper. Nothing has been paid indirectly. (Stubbs, 290.)

The giving of rebates has not existed since we took the routing into our own hands on January 1, 1900. (Barnwell, 440.) *It is very certain that the reservation of the right to route has prevented the giving of rebates.* (Barnwell, 453.)

Since January 1, 1900, *we have not got anything back in rebates, and that is one of the troubles.* (Naftzger, 806.)

None of the companies made any allowance this season (1900). (Maud, 818.) No rebates have been received since the carriers took charge of the routing. (Maud, 825.)

We are not now receiving from anybody, any company or any source, any commission or anything directly or indirectly by any name, by which we get back anything paid for refrigeration or for freight. We have no understanding or arrangement, or promise, that any rebates will be paid. The giving of rebates stopped last year (1899) at the end of the deciduous season, say October. (Westfall, 833.)

We have got no rebates lately. It has all stopped as far as I know. (Fay, 834.) My prognostications in my telegram to Paul Morton that he would utterly ruin the citrus business did not prove true because the carriers were not nearly so arbitrary in their routing as I thought they would be. (Fay, 837.) We are making out of our business less than we did before by the earning of rebates which were frequently received. (Fay, 838.) Last year we got rebates on 1,200 cars, on all orange shipments and on the lemons, averaging $7.50 a car. This year we will ship about 1,000 cars and we get no rebates on them. (Fay, 838.)

No rebates have been paid or promised since January 1, 1900. None have been paid by the Continental Fruit Express. (Earl, 848.) We are receiving no rebates or allowances from eastern connections now, nor have we any understanding that they are to be paid hereafter. The railroads are routing those cars now and they go over all kinds of roads. We have no control of the routing. *Those eastern roads cannot buy the business.* If they wished to they cannot buy it. (Earl, 848-9.) The shippers are not getting any drawbacks from the Continental Fruit Express nor from any car line. (Earl, 849.)

I have received no rebates since January 1, 1900. (Gregory, 853.) There have been no offers of rebates since January 1, 1900, and no promises of rebates, and no rebates have been received, and I do not expect to receive any. (Gregory, 853.) Aside from losing control of my shipments I lost my rebates too. (Gregory, 855.)

Since January, 1900, the Continental Fruit Express has not been able to effect any arrangement for rebates, I presume because the carriers are doing the routing. At any rate, I know that *the routing must be in our hands in order that we may realize on any rebate arrangement.* (Moulton, 852.)

The effect of the routing rule was absolutely to stop the giving of rebates and to leave on the Santa Fe rails Chicago business that previously left them. (Bissell, 876.) Our routing of the citrus business absolutely prevented the necessity of giving rebates.

The effect of the routing rule is that everybody gets the same rate, which, as I understand it, was the object of the Interstate Law. (Bissell, 877.) One of the benefits that would properly come from our routing this business would be that we have it in our power to divert business or withhold it from a road which would be taking an unfair advantage of patrons with respect to the settlement of just claims. (Bissell, 879.)

The effect of our taking the routing was to stop absolutely the giving of rebates. (Chambers, 893.) *Now the freight takes the route that gives the best general service, considering time and ability to divert and return cars promptly. The circular that I made up shows the most direct routing to all destinations.* (Chambers, 896.)

The general effect of our routing has been that we get better service from the refrigerator cars. They are returned to junction points with more regularity and to points where we want them. The icing facilities are better for the reason that we know the lines over which business is going to move and proper arrangements can be made with those lines for providing ice, which is one of the very important things to be done. (Chambers, 897.)

It is impossible to give rebates now. (Chambers, 897.) *The effect of our routing citrus fruit has been to expedite its transit very materially. Since* 1900 *the routing business has not been saleable, and consequently there is no traffic in it.* (Chambers, 905.) It is not true that the effect of our instructions in the routing circular is that agents cannot allow a change of the percentage, or of the through rate, or of the business. (Chambers, 912.)

I should say that the direct effect of routing by the initial carriers is efficiency, for they are in a position to control proper service, proper facilities, proper return of empties, and proper settlement of claims. (Sproule, 927.)

On the effect of the routing rule the Circuit Court of the United State said (1032):

"It is true that said rule has struck down an unlawful system of rebates. That result however, which was but incidental, in no way affects the main, and, as will appear later on, the pivotal fact in this case, that the defendants and their eastern connections in entering into the contract and combination for routing by the initial carriers intended thereby to uphold their published rates."

And is it not the purpose of the Interstate Commerce Law and the rule of right dealing that published rates should be upheld? Must not the published tariff stand until it is superseded by another publication? And, as we have before suggested, is there anything in the record to show that under the arrangement another tariff could not be published? Certainly there is not.

So-called traffic pool with connections.

In its conclusions the commission found that a tonnage pool of traffic among connecting carriers *not defendants* was established and that the defendants so controlled the routing as to give "specific percentages" of its traffic to their several connections. (74.)

In his dissenting opinion chairman Knapp of the commission says that a careful examination of the evidence failed to convince him that there was any substantial basis for the charge that the initial carriers so controlled the routing as to effect a violation of the anti-pooling section. (80.) He points out that the charge is inconsistent with *the other finding of the commission that the actual routing was generally according to the request of the shippers.* He mentions that if, as is admitted, the traffic in most instances was carried by the road selected by the shipper, it is diffi-

cult to see how the connecting carriers were at the same time pooling it in violation of the 5th section.

We shall show from the record that the evidence clearly supports the views of chairman Knapp, and that there is absolutely no justification for the conclusion reached by the commission that the initial carriers were pooling the business with their connections.

When the initial carriers determined to route the traffic Edward Chambers, General Freight Agent of the Santa Fe, prepared a routing circular or a letter of instructions to its agents telling them how the traffic should be distributed to connections and showing what percentages of the business should be assigned at each junction point to the carriers entering there. One of these circulars may be seen at pages 368 *et seq.* For example, it directed that at Akron, Ohio (see page 369), 50 per cent. of the citrus traffic be given to the K. K. K., I. I. I., and B. & O., and 50 per cent. to the K. K. K., I. I. I., and Erie. In like manner an assignment was made as to all junction points. Mr. Chambers prepared this tabulation out of his head from his long experience in the business and complete knowledge of its movements. The routing circular was designed to be an approximate guide to agents, so that they would not be left upon their own resources as to routing under the new order, and it was an expression of what channels the business had theretofore passed through. It was not a hard and fast distribution, it never was followed except approximately, it was frequently changed at the request of shippers, and it was in no sense an agreement with eastern connections, for every one of them was abso-

lutely in the dark as to what business it would get or whether it would get any at all. The proposition of the commission, adopted by the Circuit Court (1022), that the routing circular showed a traffic pool among the eastern connections of the defendant is everywhere and repeatedly refuted by the record and there is not a word to be found in substantiation of the claim.

Chambers testified:—

I prepared the routing circular distributing citrus traffic to connections in the latter part of December, 1899, and it was based largely upon the proportions of business that the same lines received previous to that time, before the carriers took control of the routing. We just took into consideration that there were certain lines leading from Chicago and from the Missouri river to principal destinations that took a large amount of citrus traffic; that the delivery at the destination controlled the routing; and that the facilities of those lines were closer to the fruit section of the city and necessarily took a greater proportion of the business than other lines not so well situated. In making up the sheet I gave representation to all the principal roads leading to the different points of destination, so that our agents would be instructed as to the route that they could give the fruit *in case any shipper wanted any particular line.* (Chambers, 887.)

We did not work, though, to those percentages at all and they cut no figure when distributing the business except upon an approximate basis. The distributions of the percentages were an approximation which the agent was to follow as nearly as possible. *I made up the table of percentages from my own general information as to how business had moved previously.* (Chambers, 888-9.) I have been in the freight business with the Santa Fe for 25 years and can tell without consulting anybody or any records pretty close to what percentage of business goes through the different gateways. *No eastern connection*

had any knowledge whatever as to what percentage it would get. They never knew anything about it. (Chambers, 889.)

To explain, there are three direct lines into Cleveland on the routing sheet from Chicago, the Nickel Plate, the Lake Shore, and the Erie. The percentages shown, I think, are about 50 per cent. for the Nickel Plate, and 25 per cent. for the Lake Shore and the Erie. As a matter of fact the Nickel Plate has taken 95 per cent, for the reason that shippers always requested Nickel Plate delivery at Cleveland, as that depot is down in the business part of the city and close to the fruit section and is really desirable, and it would be a hardship on a great majority of the receivers at Cleveland to route the business over any other line than the Nickel Plate. (Chambers, 889.)

Although the Nickel Plate at Cleveland receives a small percentage on the distribution sheet it practically did receive the bulk of the business, and that will be true of other points. There was a departure from the percentage estimates, as we intended and expected. (Chambers, 890.)

In fixing the percentages of distributions we took into account the ability of the connecting carrier to handle the traffic promptly and satisfactorily and to make prompt returns of empty cars and also to return cars loaded as far as possible. (Chambers, 890.)

The suggestions of the Interstate Commerce Commission that we assumed control of the routing for the purpose of creating and maintaining a pool with the eastern connections is absolutely wrong. Our connections have known nothing about it, nor had they anything to do with it. It has been absolutely in our hands. I have handled all the details, and through me is routed all the citrus fruit that moves out of California on the Santa Fe line." (Chambers, 894.)

Sproule, testified:—

The tonnage pool is a myth from the beginning. There was no relation whatever between the routing rule and the existence of a tonnage pool. Such a pool had no existence. (Sproule, 919.) In distributing the

tonnage of citrus fruit over connecting lines *we let the business take the routes which it had taken under former conditions.* You might call them the direct lines that were originally in the traffic. In alotting the percentages we aim to follow the natural and former drift of the traffic, and also to give effect to the preferences for certain routes which the shippers had shown. (Sproule, 923.) The business is distributed among the lines that serve the territorities the oranges are to reach. It is service that controls." (Sproule, 924.)

Morton, testified:—

There was no pool or understanding of any character that could be distorted into a pool of the business east of Chicago, or east of St. Louis, as suggested in the opinion of the Interstate Commerce Commission. They have nothing to say about it. They take what traffic we give them. (Morton, 125.)

Business to connections has been divided on the basis of equity and justice. *We have tried to give the lines that perform the best service the most of the business.* The element that controls in apportioning this business is chiefly good service. We give business going to Pittsburg to the Pittsburg line which can take it to Pittsburg most expeditiously, and to Detroit to the line that can handle it to Detroit quickest. And the business is divided all through on the basis of good service. *Another consideration is to get returning cars back quickly.* (Morton, 126.)

There is absolutely no agreement or understanding of any kind with any of the eastern connections that it shall have one per cent. or 50 per cent. of the business. I have in mind one connection that has better facilities at one point, where it has erected at a large expense an orange receiving house. Of course that is considered, and we have followed the inclination of the shipper. There has been nothing hidebound about this matter. *Nor is there any agreement or understanding between the eastern connections themselves as to a division of the business.* (Morton, 126.)

Parkyns, testified:—

Mr. Sproule, Freight Traffic Manager, determines how the business shall be distributed to connections. At the beginning of each season he states the number of cars, presumably, that will go over different lines. He puts out what you may call a percentage sheet. *The percentages given fluctuate in practice.* (Parkyns, 233-4.) *The connecting carriers are not privy to the percentage sheets. The preparation of them is a matter upon which the initial carrier acts upon its own exclusive initiation.* (Parkyns, 272.)

It was testified by Mr. Nadal (304), the witness who purloined from the Southern Pacific Company private information while he was in its employ, and who appeared as a witness against it for the purpose of showing a pool of traffic with connections, that it is a difficult matter to follow the percentage tables. He knew that it was not only difficult but also impossible, and he was aware, moreover, that the percentages were mere approximations.

There has been no understanding with connecting carriers as to the proportion of traffic which they would receive. A great many requests come from eastern connections asking for a larger share of the business after it passes our terminus, both by mail and otherwise. (Barnwell, 412.)

The Wisconsin Central on January 10, 1902, wrote us saying that certain orange shippers in Redlands, California, wanted routing over the Wisconsin Central to Fond du Lac. The routing was given. (Barnwell, 414-5.)

Does not that show that the Wisconsin Central, named in the joint tariff, was not a party to a traffic pool? And that the Commission was wrong (1022)

when it inferred from the routing circular that connections had an agreement for "specific percentages"?

The Southern California Fruit Exchange, on December 2, 1902, wrote us requesting Michigan Central delivery to London, Ontario. Michigan Central delivery was given. At that time the distribution sheets contained only Canadian Pacific delivery. (Barnwell, 416-7-8.)

Does not that show that the Michigan Central, named in the joint tariff, was not a party to a tonnage pool of "specific percentages" and that it was not getting a fixed proportion of the business? And if the Canadian Pacific had a "specific percentage," how could a part of the business going to it have been taken away and given to the Michigan Central?

On November 25, 1902, the general manager of the Canadian Pacific Dispatch requested that it be favored east of Chicago with some of the citrus traffic, to which affirmative answer was made. (Barnwell, 418-9.)

Does not that show that the percentage sheet or private routing circular was deviated from, that the business of one road was taken and given to another, and that the percentages were not "specific"?

On December 1, 1902, the Canadian Pacific Dispatch wrote that Blodgett & Company of Worcester, Massachusetts, preferred to have oranges routed by the Canadian Pacific and asking whether the request would be granted, and it was. (Barnwell, 419.)

Does not that show that the line over which the business had been going did not have a fixed agreement as to tonnage, for otherwise how could it have been taken from it and given to the Canadian Pacific?

Since the reservation of the right to route by the carriers no different arrangements have been made with any connection than such as I have just read (referring to letters from eastern connections asking for business from the initial carriers). In fact, we had no transactions with any connections of the defendants other than those just related respecting the distribution of business to the lines of connecting carriers. (Barnwell, 420.)

On March 17, 1903, A. F. Naftzger, president and general manager of the Southern California Fruit Exchange at Los Angeles, wrote asking for certain changes in a preferred delivery sheet which he had previously submitted and which we had been following in handling the business of the exchange, which is between 40 and 50 per cent. of the Southern California business. The changes requested were made. A great many verbal requests were made to our officers and agents, and where they appeared to be in good faith they were granted. (Barnwell, 420.)

Does not that show that there was no hard and fast rule giving "specific percentages" of tonnage to particular eastern connections?

On March 27, 1902, A. Gregory of Redlands, California, wrote requesting that shipments to Carthage, Missouri, be delivered to the Frisco line at Wichita instead of going to Kansas City. This request was granted, although it robbed the Santa Fe of about 205 miles of haul. In the matter of this whole business *we follow the routing circular only so far as it will not work hardship to the shipper.* (Barnwell, 423.)

Does not that show that the business going to one connection was taken away and given to another and that there was no agreement with connections as to tonnage?

At the request of shippers for routing and deliveries we have given up to connecting carriers a great deal of business which we could have hauled farther on our own line, as where we surrendered at Pueblo business destined to Omaha, which we might have taken to Kansas City. (Barnwell, 423.)

On February 21, 1903, Anthony Shaw of Pittsburg wrote to the Spar Fruit Company of Los Angeles asking for certain routings and upon the request of the Spar Fruit Company the routings desired were given by the Santa Fe. (Barnwell, 424.)

How could those routings have been changed by taking from one connection and giving them to another if the distribution sheet and its percentages showed an inflexible tonnage arrangement with connections?

From pages 5 to 25 of the record will be found a great deal of correspondence showing that there was no tonnage pool or agreement with connections, and that the eastern roads were entirely in the dark as to what they would receive or whether they would receive anything.

We aim to equalize the amount of freight we have to give to various direct lines; *we increase the percentage at one time and decrease it at another* so as to make a fair distribution. (Barnwell, 427.)

The Kansas City Southern Railway Company, on September 12, 1903, wrote that it would like to have a portion of the Fort Smith business by way of Kan-

sas City and a portion of it was given to them. At the time the routing circular did not name this road. (Barnwell, 431-2.)

On November 21, 1901, A. H. Naftzger of the Southern California Fruit Exchange mailed a list of deliveries he desired made in various eastern states, stating his reasons, and the deliveries were allowed. (Barnwell, 433-5.)

The request of the Southern California Fruit Exchange asking changes in its lines of routings to various points was granted. The change requested from the Frisco line at Kansas City robbed the Santa Fe of 200 miles of haul. (Barnwell, 437.)

On January 13, 1902, the New York Central & Hudson River Railroad Company wrote us giving the names of numerous consignees who desired citrus fruit to arrive over the New York Central. The request of the connecting carrier was granted and the allowance of 50 per cent. in its distribution circular to the New York Central was changed to 75 per cent. (Barnwell, 438-40.)

And yet the Commission found (74) that the defendants so controlled the routing as to give *specific percentages* of its traffic to their several connections!

We never had any correspondence or any dealings or understandings, verbal or otherwise, with connecting carriers respecting the distrbution of citrus fruit different from those I have read in evidence. (Barnwell, 440.)

For example, at Buffalo the routing circular shows 20 per cent. to one line, to another 20, to another 40, and to another 20. *This is the result of making the*

distributions and deliveries asked by the shippers. (Barnwell, 443.)

In assigning business to connecting carriers we took into consideration the promptness with which they handle business, with which they settle claims for delay, lost or damaged freight, and their relative ability or inclination to return promptly empty equipment, and also equipment loaded, although we never pressed hard on that point, as we have to get the cars back. (Barnwell, 443.)

The distribution figures were worked out principally by Mr. Chambers, general freight agent. (Barnwell, 443.) *The connecting carriers do not know what the distributions are.* (Barnwell, 443.)

We are not obliged to follow the distribution sheets at all. *They are merely a guide and we do vary the distributions from time to time.* It is not practical to follow them is we consider the requests made upon us. We have varied the figures in the distribution circular from time to time. (Barnwell, 443.)

Since we assumed charge of the routing in 1900 there has never existed any understanding of any sort with connecting carriers in any part of the United States or Canada, or with car companies, their representatives, or agents, about the amount of business that should be distributed to any railroad or car line, or as to the distribution of freight receipts or citrus traffic, except as we are governed by our division sheets, which apply to all other traffic. (Barnwell, 445.)

We make no comparisons with the Southern Pacific Railroad Company of the monthly receipts showing

the business that goes over connecting lines. (Barnwell, 451.)

The replies of the traffic managers of the different connections appearing on pages 870 *et seq.* show conclusively that they had no understanding with the initial carriers as to a division of business. I think the telegrams received from time to time from the traffic departments of the eastern connections indicate that there was absolutely nothing in the suggestion of the Commission that we assumed control of the routing for the purpose of making a pool with eastern connections. (Bissell, 879.)

There has not been any understanding with eastern connections as to what they would receive beyond the statement that they would be given fair treatment, *and as a matter of fact there is not one of them today that knows what percentage it gets.* There is no tonnage pool. There never was any tonnage pool, and there never was any agreement, understanding or contrivance by which the routing of this business had anything to do with a tonnage pool east of Chicago or St. Louis. *A tonnage pool with our eastern connections, based on this routing, was absolutely never thought of.* (Bissell, 879.)

The basis of determining proportion or percentage of citrus fruit awarded to connecting lines of the Santa Fe was worked out by Mr. Chambers from the record of the business. He drew up the routing sheet which showed how it should be properly divided to the interests of the business—that is, I mean that in New York City almost all the orange shippers want Erie delivery. In Pittsburg I believe it is the B. &

O.; in Cleveland the Nickel Plate; in Buffalo the Lake Shore. He (Chambers) submitted the schedule to me and we looked it over and concluded that we would go ahead on it, and it has been changed from time to time. (Bissell, 880.)

The return business was considered, but that was not a guiding rule. For instance, the Pennsylvania gives us more west-bound business than any other line and it gets the lowest percentage of the business from us. (Bissell, 881.)

At the time the routing circular was made up we were very particular to give the best routes east of Chicago, as we expected fault would be found. (Bissell, 881.)

The chief factor that we considered in apportioning the business was the record those lines had made in the past of being able to transport traffic to a given market with dispatch and satisfaction. (Bissell, 881.)

We did not give to each company a certain percentage of the business anyhow whether it competes or not, and one of the factors in establishing what we think a connection is entitled to is its ability to do the service in a satisfactory manner; and if we should find one of our eastern connections neglecting this business and not treating it fairly, and not giving the shippers the consideration they were entitled to, it would soon find that it had to settle with us. (Bissell, 885-6.)

The matter of getting return cars with loads was never taken into account to the detriment of the shippers. (Bissell, 886.)

We have reduced and changed percentages from time to time, as the exhibits on file in this case will show, and the allotments to any particular line were not invariable. We took away business from our connections that were not making time. (Sproule, 929.)

Does not the foregoing prove beyond all question that no tonnage pool was entered into by the initial carriers and their connections? The finding of the Commission (74) that there was a tonnage pool is merely an inference—a conclusion jumped at as an effect of the private routing circular of the Southern California Railway Company to its own agents. (1022.)

It seems strange that the flood of testimony which we have just reviewed, in volume and movement like a Mississippi, should have been absolutely ignored by the United States Circuit Court and a decision rendered "that the routing contract here in controversy does so apportion freights." (1046.)

One of the "conclusions" of the Commission which controlled the court in its decision on demurrer to the bill and which undoubtedly had its effect upon the decision on the merits is as follows (1022):

"The routing circular of January 20, 1900, extracts from which appear herein in connection with the findings as to the rule of the carriers reserving to themselves the routing, shows that the orange shipments were forwarded by the initial carrier so as to give certain percentages of the traffic to connecting lines."

Another "conclusion" of the Commission, also quoted by the court in the decision on demurrer (1022), is as follows:

"It further appears that a tonnage pool of this traffic as between the connecting carriers *not defend-*

ants was established, and that the defendants so control the routing as to give specific percentages of this tariff to their several connections, thereby fulfilling and giving effect to this unlawful and forbidden arrangement. Reason is found in the facts shown for the *belief* that the suppression of the practice of allowing rebates was only an incidental result of and was not the primary or principal object of the defend- carriers in taking over to themselves control of the routing beyond their respective roads, but that the object was to give effect to the tonnage division before stated between their connections."

Now, there should be something stronger to show this object than the misty statement that "reason is found * * * for the belief." What was the reason for the belief? It was not an evidentiary reason. There was no evidence to support it. There was a flood of positive proof to controvert it.

That the routing circular did not give "certain percentages" or "specific percentages" to connections; that it was intended only as an approximation for the guidance of agents of the initial carrier alone; that it was changed from time to time without the knowledge or consent of connections; that the percentage at a given point to one connection was reduced and the percentage to another increased without either connection having anything to do with or knowing anything about it; that whether a conection should receive a percentage of the traffic or anything at all was a matter of which it was wholly in ignorance; and that, in short, there was not the shadow of an understanding of any sort whatever with eastern connections that anyone should get "certain percentages" of any traffic whatsoever—all these are facts which were estab-

lished by what the defendants supposed would be overwhelming testimony, by the positive and unqualified sworn statements of all the men who had anything to do with the matter and by correspondence from eastern railroads betraying their absolute ignorance of the whole situation. Of what use is testimony, anyway?

Even before the bulk of this enormous accumulation of evidence on this point had been presented, the commission had not temerity enough to say positively and squarely that the practice of routing was designed to effect a tonnage division. Notice that in the second sentence of the last paragraph just above quoted the commission goes no farther than to say that "reason is found in the facts shown for the belief." In the first paragraph above quoted the commission draws from the routing circular alone the inference that the traffic is divided with connections; and in the second paragraph it states another inference—that there is reason to believe. The "facts shown" are the routing circulars which suggest the inference. How is that for a broad and deep foundation on which to rest a decision involving annually 25,000 carloads (214-5) of traffic?

After the commission had made its conjecture, without any evidence of a traffic division with connections and with positive proof that none existed, the defendants went to work in the United States Circuit Court to demonstrate so clearly that there was no tonnage arrangement that even the blind might see it. But the court disregards the evidence and decides (1046) "that the routing contract here in controversy does so

apportion freights among the defendants' eastern connections and is essentially such a pool."

Shippers Never Routed.

The conclusion of the United States Circuit Court on final hearing was that any agreement between competing railroads whereby the volume of freights each shall receive is to be determined through any conventional means which is intended to and does suppress competition in rate or service is a traffic pool; and that the routing contract here in controversy (meaning the routing reservation in the joint tariffs) does so apportion freights among the defendants' eastern connections and is essentially such a pool. (1046.)

Therefore "the routing contract here in controversy" (1045) was intended to and does suppress competition either in rate or service. In other words "the routing contract" must have changed the conditions that existed before it was formed. In answer to this we purpose to show that previous to the enforcement of the routing rule on January 1, 1900, the shippers never in fact routed their business. They made an illegal sale of the routing privileges to the car line companies, which in turn made an illegal sale of the traffic to the eastern connections of the defendants. Therefore, as the shipper never routed the business, the condition as to routing was not changed by what the court terms "the routing contract," and the routing contract did not "suppress competition either in rate or service." We are speaking of legal competition. Of course it did suppress absolutely and almost instantly the gross illegal competition which had been festering for years and which had grown out of

what the court in describing as "competition" characterizes as "that fierce rivalry" which "existed between their eastern connections before the routing rule was adopted."

Now let us take a look at the conditions which existed before "the routing contract" was entered into and which, it is alleged, "does suppress competition in either rate or service."

"Rebates of about $7 a car were paid to us by the Refrigeration Company *for the privilege of dictating the route.* (Westfall, 829.) Hosberry never represented anybody but himself to me, although I believe he was a live stock agent for the Clover Leaf. I paid him no salary as our traffic manager. *I presume he considered the privilege of making the route over which our cars should pass to be sufficient for his trouble.* (Westfall, 831.)) Previous to the enforcement of the routing rule the routing was to a large extent in the hands of private car lines, although apparently in the hands of consignors. (Morton, 118.) Generally speaking the traffic did not go over the line of the connecting carrier that some shipper might have wanted, but *it traveled as directed by the car line company.* (Morton, 122.) The car line companies sold the routing to eastern connections of the defendant companies, the railroad giving the largest rebate securing it. (Morton, 119.)

Two years ago Hosbury of the Clover Leaf offered us inducements to route business that way. (Earl, 847.) The car line companies usually did the routing and they paid the rebates. (Gregory, 853.) *The shippers gave up the routing to the car lines as a consideration for rebates. I know this.* (Bissell, 865.)

The car companies went to the shippers and contracted for the routing of the business and they routed over lines with which they had arrangements for additional mileage. (Chambers, 890.)

The car line companies did the routing absolutely and not the shipper, and I know it. *I knew a number*

of shippers who were prevented by the car line companies from routing their own citrus fruits. As an example, I went to the manager of the Arlington Heights Fruit Company in 1897 or 1898 and told him that it did not look exactly right that his business should go over the Southern Pacific when it was loaded on our line. He answered that he preferred the Santa Fe and when he made his arrangement with the Continental Fruit Express he was told it would go over the Santa Fe largely, but that the manager of the Continental Fruit Express insisted that it be routed over the Southern Pacific. That year the Arlington Heights Fruit Company controlled about 500 carloads. I went to the manager of the Continental Fruit Express and he told me that the Santa Fe could not have the business unless it would pay excess mileage amounting to $10 per car to Kansas City and $12.50 to Chicago. (Chambers, 891.) *The shippers surrendered the routing to the car line companies when they were receiving rebates.* (Chambers, 892.) The shippers never routed the business to my knowledge. (Chambers, 894.) *When I went after the business I found that the car line companies controlled it and did the routing* of the citrus traffic. (Chambers, 894.) Before we took charge the routing was controlled largely by mileage arrangements, that is to say, the money that was given for rebates. (Chambers, 896.) Previous to January, 1900, the car line companies controlled the routing through the paying of rebates to the shipper or producer. (Chambers, 901.)) It gradually got to a place where *the rebate created routed the car.* (Sproule, 915.)

Although the car lines paid the rebate some of them would pay more back if the shipment traveled over certain lines. *The car company dictated the terms to the eastern connections to a certain extent."* (Naftzger, 813.)

Respecting this routing privilege which the shippers never exercised and which was therefore never lost to them by the "suppression" of the "competi-

tion" and the "fierce rivalry" whch the court found to have previously existed among connecting carriers, Chairman Knapp of the Interstate Commerce Commission, in his dissenting opinion, said (p. 80):

"Disconnected from the privilege of diversion, it is not perceived that the legitimate value to the shipper of the right of routing is important. That right is important to the carrier; and this we may properly take into account in deciding to which of them the right belongs."

Even before a considerable volume of evidence had been introduced to show that the shipper had always sold the routing and therefore never controlled it, and that consequently the promulgation of the routing rule lost him nothing but an illegal gain, Chairman Knapp saw that this routing privilege was of absolutely no value to him if the carriers would grant diversions that he might want. Those diversions were granted.

Since the initial carriers took the routing we have been able to get the diversions wanted freely. (Stearns, 257.) As a general rule since the carriers have been routing the diversions requested by shippers have been granted.

By way of explanation to the court it may be stated here that the practice of diverting cars in transit is peculiar to the citrus traffic and has grown out of the desire of the carriers to foster and help the business in every way. As the citrus orchards are 2,000 miles or more from the central markets, much time is lost where contracts are made by correspondence. So the idea was conceived of putting the cars in motion as rapidly as they could be loaded and of effecting sales by telegraph or through eastern agents after they had

started. The car would be billed to a fictitious destination, say Chicago, and after it had been on the road two or three days the initial carrier would receive a request to divert it at La Junta to Denver or to divert it at Newton to Galveston, or to divert it at Kansas City to St. Louis, a sale having been made by correspondence or through an agent at some eastern point. After the car had gone to Denver or to Galveston or to Kansas City the expected market might fail, and eventually the car diverted from Santa Fe rails would reach, over some other line, Chicago, the original destination and the eastern terminus of the Santa Fe. It will be perceived that in such circumstances, which were very common, the Santa Fe would lose a good part of the haul to Chicago. Nevertheless, the initial carriers have afforded to the shippers every convenience in diverting these "tramp" cars.

Last year (1904) out of a total of 11,805 cars handled by the Santa Fe 7,400 were diverted from the original point of destination. Many were diverted two or three times, the average being approximately 1.8 times, aggregating a little more than one diversion for each car shipped. You do not know about the cost of telegraphing in connection with these diversions and the work and labor there is attached to the accommodation. We started in at one time to charge $2.50 for each diversion and if we had done so we would have collected over $25,000 last year. (Morton, 136-7.)

If we were all treated alike as to diversions, then I presume it would amount to the same thing whether we divert the cars or the carriers do. (McLeod, 239.)

From 40 per cent. to 60 per cent. of the orange shipments are diverted from their original desination and frequently a car is diverted three or four times. (Neimeyer, 165.)

The matter of diversions is exceptional and peculiar to the orange business; it is a courtesy and a privilege accorded by the carrier. (Sproule, 937-8.)

This year, out of 4,685 cars that have been shipped, there have been 4,344 diversions, which costs the Southern Pacific approximately 12,000 telegraphic messages. (Sproule, 945.)

Not only have the diversions requested by shippers been freely granted, but since the carriers have been routing the requests have been executed more quickly and correctly.

I should say that since 1900 we have had a decidedly better knowledge of the situation of cars so that we could divert them than we had before. (Rule, 973.)

For the season just closed (November, 1903) the Santa Fe has given about 12,000 diversions. The rule regarding diversions continued the same after we took the routing as it had been before and the fruit has been diverted more promptly than ever. (Chambers, 911.)

Precisely the same freedom of diversion has been allowed since 1900 that existed before.

From the foregoing it ought to be clear that Chairman Knapp was correct in his opinion, that the privilege of routing is of no importance to the shipper. Indeed, the witness Maud (823) stated frankly and all of the witnesses have indicated with considerable clear-

ness that the only use they have for the routing privilege is to sell it.

If, as we have shown, the shipper never routed, then the assumption of the right to route by the initial carriers, did not change existing conditions, and so did not "suppress competition either in rate or service."

As to Undue Prejudice.

Although the court, in its decision on the merits, took leave (1034)) of the several question which had been discussed by the commission and stated the sole issue to be whether the routing provision was in itself a contract for the pooling of freights, we shall nevertheless give attention to the considerations which moved the commission to its order, as the sufficiency and legality of that order, which the Circuit Court is enforcing, is necessarily in question.

In paragraph 4 of the decision of the commission of April 19, 1902, it is stated that the practice of the carriers of designating the route is in violation of the statute because it "subjects the owners and shippers thereof to undue, unjust and unreasonable prejudice and disadvantage *and* gives to the carriers undue and unreasonable preference and advantage." (56.)

In its "conclusions" the commission stated that the shipper is put to a commercial disadvantage because he is prevented by the routing rule from diverting consignments; and that the granting of a given routing to one and the denial of it to another is of itself an unjust discrimination.

We have already shown that the shipper has not

been prevented from diverting his consignments; and under this heading we purpose to show that a route was not given to one shipper and denied to another not only, but also that there was no undue prejudice shown in any relation whatsoever.

In the dissenting opinion of Chairman Knapp it is pointed out as a significant fact that it was not alleged in the complaints, nor proved at the hearing, nor claimed in the argument, that any actual discrimination between shippers had resulted from the control of the routing by the defendants; and he argues that it is contradictory of the undisputed testimony to claim that the condition cannot be enforced without unjust and unreasonable discrimination. (79.)

As before stated, we intend to make clear that as a matter of fact the routing rule was in force not only without unjust and unreasonable discrimination in any particular but also that its enforcement operated to remove prejudices and discriminations.

"Under the condition of things that existed up to January 1, 1900, there was a great discrimination, and in nearly every instance Mr. Earl received better rates than any of his neighbors did. Some of the car lines received from the shippers for a consideration the privilege of routing, in some instances the shippers getting possibly all there was in it, in other cases only a small proportion. (Morton, 122.)

Since we have routed there has been no discrimination or undue preference or advantage as to one locality over another. (Morton, 129.)

It certainly has made an equality of rates. The routing rule has entirely wiped out the discrimination that was practiced prior to January 1, 1900. It has given the small shipper a chance to grow. It has taken away from the large shpiper any advantage. (Morton, 130.)

The matter of controlling the routing by the carrier is applied to all shippers alike, and I do not know of anybody that is getting any special favors. (McLeod, 250.) In acceding to the requests of shippers to route or divert we never dealt with any shipper differently from the manner in which we dealt with others. (Barnwell, 440.) In handling citrus business all shippers have been treated alike. (Barnwell, 445.)

No locality has had any privilege or advantage or preference with respect to the citrus fruit shipments that was not open to any other locality in the citrus fruit business, nor have we given any preference or advantage to any business similarly situated with the citrus fruit business. Since 1900 we have not given to one shipper a choice of route not given to another. (Bissell, 880.) The routing rule is not applied to deciduous fruit and vegetables because there is no such abuse in the deciduous fruit business. (Sproule, 935.) Since January, 1900, no preference or advantage has been given to any locality as against another town or locality, but they did exist before. (Chambers, 897.) Previous to 1900 some shippers had their goods delivered at destination cheaper than other shippers, but it is not so now. (Chambers, 898.) In routing the citrus fruit we have not given a roundabout road to one shipper and a more serviceable road to another. There is no discrimination whatever as between individuals or shipping companies or destinations. (Sproule, 924.) The application of the right to route has been made uniformly to all shippers in California so far as I have heard. (Moulton, 860.) The effect of the routing rule is that everybody gets the same rate, which, as I understand it, was the object of the Interstate Law. (Bissell, 977.) Since we took charge of the routing in 1900 no shipper of citrus fruit has had any special privilege or rate or advantage which was not open to every other shipper; and no locality has had any privilege or advantage or preference with respect to the citrus fruit shipments that was not open to any other locality in the citrus fruit business; nor have we given any preferences or advantages to any

business similarly situated with the citrus fruit business; nor have we given to one shipper a choice of route not given to another. Since we have been doing the routing every shipper pays the same rate." (Chambers, 897.)

Routings Granted to Shippers.

As the conclusion of the commission was that by controlling the routing the carriers might subject some shippers to "unjust discrimination," and as the judgment of the Circuit Court was that the assumption of the right to route by the carriers "suppressed the "fierce rivalry" and the "competition" which had before existed, we purpose to show from the record that after 1900 there were available to the shipper exactly the same routes that they had before and that their requests for routes were generally granted. It may be asked why, then, did the initial carriers assert the right? The answer is that the mere assertion of it was enough to warn the buyers of business that their contracts of purchase could not be carried out, and the result of this warning was that no contracts were made.

In his dissenting opinion Chairman Knapp of the commission pointed out that it had been found that routing had actually been given according to the requests of the shippers, and he argued that this finding by the commission was inconsistent with the charge that the routing rule was being employed to effectuate a tonnage pool. He said (81):

"If in most instances, as is admitted, this traffic was carried by the route selected by the shipper, it is difficult to see how the connecting carriers were at the same time 'pooling' it in violation of the 5th section."

In most cases we always had the routing by asking for it. (Stearns, 261.) I understood it was open to us to name intermediate points through which we might want a tramp car to go. (265.) If the shippers had paid the sum of the local rates they could have had any routing desired. (Nadal, 346.) The Santa Fe routing circular gave shippers the right to make notation on the shipping order as to what points they would like the car to pass through on the way to destination. (369.) The request for routing on behalf of A. C. Blair & Company of Cleveland was granted. (Barnwell, 410.) So, also, the request of Rudduck, Trench & Company of Los Angeles. On the request of the California Citrus Union it was given. (Barnwell, 438.) Shippers were allowed by the Southern Pacific to name the points through which they would prefer to have shipments pass. (Parkyns, 801.) This was expressed on the Southern Pacific routing circular. (801.) It is true that over the Santa Fe we have had substantially the same routing since January 1, 1900, as we had before in nearly every instance. (Maud, 827.) I cannot mention an instance in which I was injured by a routing over the Santa Fe which I did not want. (Maud, 827.) I do not recall a single time that we asked a routing from the Santa Fe and did not get it. (Moulton, 859.) I always got the route that I asked for from the Southern Pacific. (Moulton, 860.) The business is being routed today over the best roads in the country. (Bissell, 878-9.) We always routed the shipments by the most direct lines since January 1, 1900. (Chambers, 896-7.) Our routing circulars to agents carried a great deal of latitude. They took cognizance

of special facilities at different points of delivery. We took cognizance also of the desire of the shippers as to terminal deliveries. (Sproule, 921.) Since the railroads have been routing we know over what lines our cars will go. They furnish us with the routing after the cars have left. I think that in most cases where we have asked for the routing since January 1, 1900, the initial carriers have given them. (McLeod, 246.) The initial carriers post daily a statement of all the fruit cars forwarded from Southern California for the information of everyone.' (Maud, 826.)

Competition.

We have already pointed out the strange views entertained by the commission and the court as to what sort of "competition" the shippers of citrus fruits were entitled; and we have also shown that as to this illicit competition, the profits thereof went in the pockets of middlemen and did not go to the tillers of the soil and the growers of fruit. So there is no occasion in this case to express any sympathy for the toiler or to feel that he has been in any way deprived of what he had. Moreover, we shall show further that the producer of fruit never in fact routed his product, but that so far as he could get rebates he sold the routing absolutely to the private car companies. Therefore he was deprived of nothing by the routing rule which the carriers put into effect in January, 1900. On the contrary it will appear that since the routing rule has been in force he has had open to him and has used the same means of transit that were available to him before.

In addition to what we have already quoted from the court on this subject of competition we invite attention to this (1038):

"Such contract (referring to the routing provision in the joint tariff) shows upon its face a combination intended by concert of action to make and control changes in market rates * * * and in effect leaves to the arbitrament of such carrier the distribution of profits and certainly destroys so far as shippers are concerned all competition between the connecting lines."

We have already shown the "competition between the connecting lines" which was "destroyed" by the initial carriers when they dictated the routing.

It seems to have become definitely fixed in the minds of the commission and the court that the routing rule somehow operated to prevent a reduction by eastern connections, through competition, of the rate of $1.25—that is, that were it not for this rule a tariff might have been published offering a lower rate. One answer to that is that from 1886 when the rate was reduced from $1.50 to $1.25, down to 1900, during all of which time the shippers had the privilege of routing and there existed the wildest kind of "competition," the tariff rate of $1.25 was not reduced. If fourteen years of this "competition" did not serve to reduce a rate which the evidence shows to be a very low one, how can it be argued that immediately upon taking charge of the routing in 1900 the carriers denied to the shippers a reduction which they would otherwise receive?

A second answer is that no amount of legal competition on the part of the eastern connections could reduce the rate. No eastern connection could of it-

self publish a joint tariff. The very name imports that a joint tariff must be made by contract. No eastern connection could compel either the Santa Fe or the Southern Pacific to enter into a joint contract with it at a rate below $1.25. If the Santa Fe or the Southern Pacific felt that the rate of $1.25 was low enough no power could compel it to become a party to a joint tariff fixing a lower rate. This is why no lower tariff rate was promulgated during the fourteen years of what the court has termed (1039) "that fierce rivalry" which "existed between their eastern connections before the routing rule was adopted;" for it is in evidence (136) that the rate was put in to nurture the business and was considered very low at the time and is considered very low today by those who understand the business.

On the other hand, there was nothing before 1900 to prevent either the Santa Fe or the Southern Pacific Company, if it thought the rate could safely be reduced, from entering into a joint tariff with any eastern connections. That is exactly the condition which exists today and has existed ever since the routing rule was adopted. Either the Santa Fe or the Southern Pacific Company may now, if it thinks it desirable to do so, promulgate a tariff with its connections. And there is not a syllable in the record to show that either of these companies is under any agreement not to do this or in any way bound to any obligation except to maintain the lawful rate as long as it is lawful—and this the law requires.

The condition since January, 1900, has been in this relation just exactly what it was before, and no infer-

ences by the commission or decrees based upon such inferences are enough to gainsay or refute the fact.

Under the routing rule there has been every sort of competition except the illegal kind—except that "fierce rivalry" to which the court referred.

Business to connections has been divided on the basis of equity and justice. We have tried to give to the lines that performed the best service the most of the business. The element that controls in the performance of this business is chiefly good service. We give business going to Pittsburg to the Pittsburg line which can take it to Pittsburg most expeditiously, and to Detroit to the line that can handle it to Detroit the quickest; and the business is divided all through on the basis of good service. We must get good service from our eastern connections in order to get our share of the business in California which we are always looking after. Another consideration is to get returning cars back quickly. (Morton, 126.)

Unless there is some good reason to the contrary we usually meet the rates of our competitors. There are numerous instances in which the Santa Fe road has changed the rate agreed upon with the Southern Pacific without consulting that company, and I think there are instances in which it has so changed the citrus tariff. (Chambers, 184-5.)

There is competition between the Southern Pacific and the Santa Fe in service. (Chambers, 215.)

The witness Nadal for the complainant, already referred to as a purloiner of the private records of the Southern Pacific Company, said that it is true that while the initial carriers have been routing there has been competition among connecting carriers, for the initial carriers would not route over lines giving poor service. He stated also that the carriers giving the best service got the business. (346-7.)

There is competition under existing conditions as much as there was before except in the fact of getting rebates. The carriers have to give good service. They have to give the citrus fruit preferred

attention. They have to satisfy the shippers and the receivers of fruit as to terminal facilities. (Bissell, 885.)

We solicit shipments through our agents from time to time so that there is competition between the Southern Pacific and the Santa Fe. (Sproule, 959.) We endeavor to meet and beat the Santa Fe time if we can although that has the short line. It is because of competition that we make diversions." (Sproule, 960.)

In working out its belief that the routing rule has somehow (not stated or disclosed) prevented the reduction of the tariff rate of $1.25, the court dissevers a question and answer from the context of the testimony of Paul Morton and employs it thus (1039):

"The sole immediate aim of the routing rule was to put the shippers of citrus fruit in a position where their patronage could not possibly be competed for by defendants' eastern connections, and Mr. Morton himself explains the matter briefly, but with great clearness, in the following extracts already quoted from his testimony:

'Q. If the initial carrier assumed the routing of the shipment the connecting carrier would be in no position to bid for the business of a connecting line, would it?

'A. No. When we took the routing of the business into our hands the eastern connections had to do business with us instead of the car company or the shipper.' "

Then the court says further (1039):

"Said rule, however, not only strikes down rebates, but destroys all the competition which section 5 of the Commerce Act was designed to protect, namely, direct competition both in rate and service."

We have just quoted abundantly to show that there was competition in service.

The question and answer taken from Mr. Morton's

testimony have relation to illegal competing for business—to the giving of rebates—to the unlawful practices already stated at large. The opinion of the court itself shows that Mr. Morton had been talking (1026) of the secret cutting of rates "in violation of the Interstate Commerce Act" and "in violation of our published tariff;" and the record (122) shows that all his testimony about maintaining rates referred to the legal rates; that it was against the discrimination which had existed; that it was about the selling of business to the car line companies for a consideration; that the business had been sold to the highest bidder; that the routing was taken in charge so that they would be no longer able to sell business and get rebates and that the grafting shippers admitted this in private; that the "sole object in assuming the control of the routing was to put an end to this rebate and cutting of the legal published tariffs."

And yet, in the face of all this and other testimony of Mr. Morton, the extract mentioned was cut out of his deposition and made to show that he intended that no connecting line should *lawfully* compete for business. There seems to run through the opinion of the commission and the opinion of the court a strained determination to establish something in this relation which did not in fact exist and which there was no evidence whatever to support. Of course we take the view that this was due to unconscious bias. But from whatever source it proceeds, the imputation—for it does not go beyond this—is unjust to the defendants.

There has been competition with respect to the icing charges which the shippers have had to pay, for

they are about $15 a car less than they were on shipments to Chicago and New York. (Chambers, 897.)

There has been competition in the quick settlement of damages accruing on delayed or injured fruit. (Chambers, 203-4, 896; Stubbs, 291-2; Bissell, 879; Sproule, 927, 939.)

There has been competition in the granting of preferred deliveries at points of consignment, and the merest wish of the shippers in this regard has been satisfied in every instance. (Naftzger, 167; Stearns, 261; McLeod, 251; Nadal, 334-6-7; Barnwell, 412-3, 447.) Indeed, the Southern Pacific routing circular instructed agents to follow the preferences of the shipper as to deliveries (691); and the Santa Fe circular directed agents to grant the deliveries that shippers might request. (369.) Although the commission stated that it did not appear in the testimnoy that any delivery requested by a shipper had been denied, still it felt under the obligation of expressing its apprehension that the initial carrier might route freight for delivery over another terminal road. (76.)

There has been competition in the respect that the Santa Fe Company has ceased to do business with private car lines and has, upon the importunities of the shippers, invested four millions of dollars in equipment of its own.

The Routing Circulars.

The commission found, as quoted by the court in its opinion on the demurrers (1022), that the routing circular of the Southern California Railway showed "that the orange shipments are forwarded by the initial carrier so as to give certain percentages of the traffic

to connecting lines." On that finding, and on the further finding quoted by the court (1022) that "reason is found for the belief" that the intent of the initial carriers was not to suppress the practice of giving rebates but "to give effect to the tonnage division before stated between their connections," the court overruled the demurrer of the defendants. After the decision on the demurrer and the joinder of issue the defendants introduced voluminous evidence to show what was their intent and what was in reality the effect of their action.

It will therefore be well to take a passing look at the routing circulars or distribution sheets which were issued from time to time as conditions required. The Santa Fe's routing circular for 1901-2 may be seen at pages 368, *et seq.*, and the Santa Fe circular for 1902-3 may be seen at pages 384, *et seq.* These circulars instructed agents that if the shipper insisted upon naming the routing to charge the local rate to the junction point on the Santa Fe System and make notation of the fact upon the way bill. (385.) It also instructed agents to stamp on the way bill going with the car a notation that to enable it to guarantee the through rate the absolute right of routing through to destination was reserved to the initial carrier. (385.)

The routing circular of 1902-3 was changed to instruct the shippers to give to consignees the deliveries asked for. (Barnwell, 407.)

The provision of paragraph 12 of the circular of December 1, 1902, that Armour cars would not be placed for routing on the Santa Fe meant that the Santa Fe had equipment enough of its own and that

it would not pay mileage or per diem on Armour cars taken from the Southern Pacific. (Barnwell, 408.)

The paragraph of the Santa Fe routing circular directing that shipments to given points reached by the Santa Fe must follow its tracks to destination was departed from when the needs of the shipper required it and not followed farther than good service would permit. (Barnwell, 409.)

Under paragraph 7 of the routing circular shippers were given the deliveries they asked for. (Barnwell, 409.) *The provision in the circulars that they be kept private was for the purpose of preventing canvassers for eastern connections from ascertaining how the fruit was being handled* and from thus making rebate arrangements, and it was also the intention to be saved from the importunities and annoyances of connections for a larger allowance of traffic. (Barnwell, 441.) The Southern Pacific routing circular stated to the agents that it would be difficult to follow the percentages given and that the percentages would be liable to change at any time. It also instructed the agents to give the deliveries requested by the shipper. (601.) All the routing circulars provided that the shipper might name points through which he would have the shipment pass. (801.)

Such, in brief, were the documents from which the commission concluded that there was a fixed understanding and agreement with eastern connections that they should have "specific percentages."

SPECIFICATIONS OF ERROR.

THE COURT ERRED:

FIRST. IN OVERRULING THE DEMURRER FILED BY EACH OF THE APPELLANTS TO THE BILL OF COMPLAINT OF SAID COMPLAINANTS.

SECOND. IN FINDING THAT THE ORDER OF THE INTERSTATE COMMERCE COMMISSION IN QUESTION WHICH IN EFFECT REQUIRES EACH OF APPELLANTS TO ROUTE SHIPMENTS OF CITRUS FRUIT FROM SOUTHERN CALIFORNIA TO VARIOUS DESTINATIONS, AS REQUESTED BY THE SHIPPER THEREOF, AT THE JOINT RATE FOUND IN THE JOINT TARIFFS MADE BY SAID APPELLANTS AS INITIAL CARRIERS WITH CONNECTING CARRIERS, UPON THE EXPRESS CONDITION THAT SUCH INITIAL CARRIERS SHOULD HAVE THE RIGHT TO ROUTE UNDER SUCH JOINT RATE (THUS GIVING SUCH SHIPPER THE BENEFIT OF SUCH JOINT RATE AND DEPRIVING THE INITIAL CARRIERS, THE APPELLANTS, OF THE CONDITION OR CONSIDERATION UPON WHICH SUCH JOINT RATE WAS MADE), WAS A LAWFUL ORDER OR REQUIREMENT OF SAID COMMISSION, AND IN ENJOINING EACH OF SAID APPELLANTS TO OBEY THE SAME.

THIRD. IN FINDING AND DECLARING IN ITS DECREE THAT THE FOLLOWING PROVISION IN SAID JOINT TARIFF, TO-WIT; "IN GUARANTEEING THE THROUGH RATE NAMED HEREIN, THE ABSOLUTE AND UNQUALIFIED RIGHT OF ROUTING BEYOND ITS OWN TERMINAL IS RESERVED TO THE INITIAL CARRIER GIVING GUARANTEE," IS STILL IN FORCE AND EFFECT SINCE IT APPEARS FROM THE EVIDENCE THAT IN THE JOINT TARIFF EFFECTIVE JULY 20, 1903, AND BEFORE THE HEARING, SUCH PROVISION WAS SUPERSEDED BY THE FOLLOWING PROVISION, TO-WIT: "THE JOINT TARIFFS AND RATES HERE-

IN NAMED ARE MADE AND ENTERED INTO UPON THE EXPRESS CONDITION THAT THE INITIAL CARRIER SHALL HAVE AND EXERCISE THE SOLE AND EXCLUSIVE RIGHT OF ROUTING ALL SHIPMENTS UNDER SAID JOINT RATES BEYOND ITS TERMINUS, AS WELL AS UPON OTHER CONDITIONS, PROVISIONS AND STIPULATIONS HEREINAFTER SET FORTH."

FOURTH. IN FINDING AND DETERMINING THAT SAID ROUTING PROVISION SO AGREED UPON AND EMBODIED IN SAID TARIFF WAS OR IS AN AGREEMENT OR COMBINATION FOR THE POOLING OF FREIGHTS OF ANY DIFFERENT AND COMPETING RAILROADS AND WAS OR IS IN VIOLATION OF SECTION 5 OF THE INTERSTATE COMMERCE ACT MENTIONED IN SAID BILL OF COMPLAINT.

FIFTH. IN FINDING THAT THE ALLEGATIONS OF THE COMPLAINT HEREIN ARE TRUE, EXCEPT TO THE EXTENT THAT SUCH ALLEGATIONS ARE ADMITTED IN AND BY THE ANSWERS OF THESE APPELLANTS.

SIXTH. IN MAKING ANY FINDINGS IN REFERENCE TO ANY ALLEGATIONS OF FACT IN THE COMPLAINT HEREIN, EXCEPT TO THE EXTENT OF SUCH ALLEGATIONS OF FACT AS ARE INVOLVED IN THE LAWFULNESS OF THE ORDER OF THE INTERSTATE COMMERCE COMMISSION HEREIN AS MADE BY SAID COMMISSION.

SEVENTH. IN MAKING ANY FINDINGS OF FACT OTHER THAN THOSE FOUND BY THE COMMISSION, TO-WIT: IN FINDING THAT THE ROUTING PROVISION IN QUESTION WAS MADE BY AGREEMENT BETWEEN DIFFERENT AND COMPETING CONNECTING CARRIERS FOR THE PURPOSE OF POOLING FREIGHTS OF DIFFERENT AND COMPETING RAILROADS, IN VIOLATION OF SECTION 5 OF THE INTERSTATE COMMERCE ACT.

EIGHTH. IN CONSTRUING SECTION 5 OF THE INTERSTATE COMMERCE ACT AS IN EFFECT FORBIDDING THE INI-

TIAL CARRIER FROM EXERCISING THE RIGHT TO ROUTE OR BY THAT MEANS FROM DIVIDING THIS TRAFFIC BETWEEN CONNECTING CARRIERS IN SUCH MANNER AS SUCH INITIAL CARRIER SHOULD DEEM FIT.

NINTH. IN HOLDING THAT APPELLANTS, OR ANY OF THEM, IN MAKING OR ENFORCING THE SAID ROUTING PROVISION WERE OTHERWISE THAN IN THE EXERCISE OF THEIR RIGHT AND AUTHORITY ARISING BY LAW IN THE PREMISES.

TENTH. IN HOLDING THAT THE APPELLANTS, OR ANY, OR EITHER, OF THEM, IN MAKING AND ENFORCING THE SAID ROUTING PROVISION WERE OTHERWISE THAN IN THE EXERCISE OF THEIR CONTRACTUAL RIGHT AND AUTHORITY WITHIN AND UNDER THE LAW IN THE PREMISES.

ELEVENTH. IN DECREEING THAT APPELLANTS, OR ANY, OR EITHER OF THEM, OR SEVERALLY, OR OTHERWISE, OR AT ALL, FROM AND AFTER THE MAKING AND ENTERING OF SAID DECREE, ARE ENJOINED AND RESTRAINED FROM FURTHER CONTINUING ANY VIOLATION OR DISOBEDIENCE OF THE ORDER OF SAID COMMISSION, AND ENJOINING AND REQUIRING THE APPELLANTS, OR ANY OR EITHER OF THEM, TO FULLY OBEY SUCH ORDER IN ANY RESPECT OR IN ALL RESPECTS.

TWELFTH. IN RULING THAT COMPLAINANT WAS ENTITLED TO RECOVER ANY COSTS HEREIN FROM APPELLANTS OR ANY OR EITHER OF THEM.

THIRTEENTH. IN HOLDING AND DECLARING THAT THE ORDER OF THE INTERSTATE COMMERCE COMMISSION, SET FORTH IN SAID DECREE, WAS OR IS A LAWFUL ORDER OR REQUIREMENT, BECAUSE IT APPEARS:

(1) THAT SAID ORDER IS UNLAWFUL AND UNAUTHORIZED UNDER THE FACTS STATED IN THE REPORT OF SAID COMMISSION;

(2) SAID ORDER IS UNAUTHORIZED AND UNWARRANTED UNDER THE FACTS DISCLOSED IN THIS CAUSE;

(3) FROM THE UNDISPUTED EVIDENCE THAT THE ROUTING PROVISION IN QUESTION WAS INSISTED UPON BY THE INITIAL CARRIERS THE APPELLANTS IN MAKING A JOINT TARIFF RATE WITH THEIR VARIOUS CONNECTIONS IN ORDER TO PROTECT SUCH INITIAL CARRIERS AGAINST THE UNLAWFUL PRACTICES OF THEIR CONNECTIONS IN THE SECRET AND UNLAWFUL CUTTING OF THE JOINT TARIFF RATES WHILE IN FORCE AND IN THE PAYING OF UNLAWFUL REBATES, PARTICULARLY TO THE TWO COMPLAINANTS BEFORE THE SAID COMMISSION;

(4) THAT THE ORDER OF SAID COMMISSION IS UNLAWFUL AS BEING TOO BROAD. IT IS NOT CONFINED TO ANY ALLEGED VIOLATION OF THE INTERSTATE COMMERCE ACT STATED OR FOUND BY SAID COMMISSION. IT IS LEGISLATIVE IN ITS NATURE AND IS NOT CONFINED TO THE PARTIES WHO APPEARED BEFORE THE COMMISSION. IT IS WHOLLY UNAUTHORIZED;

(5) THAT SAID COMMISSION ERRED IN CONSTRUING AND APPLYING SECTION 6 OF THE INTERSTATE COMMERCE ACT IN RULING THAT IT PROHIBITED THE INITIAL CARRIERS FROM IMPOSING AS A CONDITION TO THE MAKING OF JOINT RATES NAMED THE RIGHT OF SUCH CARRIERS TO ROUTE SHIPMENTS OVER CONNECTING LINES.

(6) THAT SAID COMMISSION ERRED IN CONSTRUING SECTION 3 OF THE INTERSTATE COMMERCE ACT IN RULING THAT THE ROUTING PROVISION MADE AS THE CONDITION OF SAID JOINT RATES, AND WHICH THE INITIAL CARRIERS WERE NOT OBLIGED UNDER THE LAW TO MAKE, SUBJECTED THE SHIPPERS OF CITRUS FRUIT TRAFFIC TO ANY UNREASONABLE PREJUDICE AND GAVE TO SUCH INITIAL CARRIERS AN UNDNE ADVANTAGE, IN VIOLATION OF SAID SECTION.

(7) That said commission erred in its conclusion that under the facts stated in its report there was reason to believe that the routing provision was enforced by the initial carriers so as to divide this traffic between connecting lines.

(8) That the commission erred in adjudging the routing provision in the joint tariff to be invalid, and in making its order in respect to the same, because the connecting carriers who were parties to the joint agreement were not made parties to the proceedings before the commission and were deprived of all opportunity of a hearing. Such an order would be inequitable.

(9) That the commission erred in finding that the right of the initial carrier to route was in violation of any supposed right of these shippers to divert this traffic while in transit.

POINTS AND AUTHORITIES.

I.

THIS IS A SPECIAL PROCEEDING IN WHICH THE JURISDICTION OF THE CIRCUIT COURT IS CONFINED TO DETERMINING THE LAWFULNESS OF THE ORDER OF THE COMMISSION, AND IF FOUND TO BE LAWFUL TO ENJOIN OBEDIENCE THERETO, OTHERWISE TO DISMISS THE BILL OR PETITION.

Section 16, pages 3165 and 3166, U. S. Compiled Statutes, 1901, Vol. 3.

(a) If the commission have misconstrued or misapplied the provisions of this law their order is invalid.

Int. Com. Com. v. *L. V. R. R. Co.*, 74 Fed., 784.

D. G. H. & M. R. R. Co. v. *Int. Com. Com.*, 74 Fed., 803.

Int. Com. Com. v. *D. L. & W. R. R. Co.*, 64 Fed., 723.

East Tenn., etc., R. R. v. *Int. Com. Com.*, 181 U. S., 1.

(b) The facts found by the commission were insufficient to warrant its conclusions and orders and it is therefore evident that the commission erred in applying the law to the case before them.

L. & N. R. R. v. *Behlmer*, 175 U. S., 674, 675, and 676.

(c) The evidence in the lower court showed that

the conclusion of the commission concerning the adoption of the routing provision in the joint tariff was erroneous, and its order based upon such conclusion was therefore invalid.

(d) It appears from the report of the commission that it misconstrued and misapplied section 6 of the Interstate Commerce Act in holding that carriers could not impose as a condition for the making of joint tariffs the right of the initial carrier in any event to route shipments under such joint rates.

See subdivision II of argument.

(e) The commission erred in holding that the routing provision in question made on condition or in consideration of the making the joint tariff rate subjected the shippers to undue prejudice and gave initial carriers an undue advantage.

Ilwaco Rly. & Nav. Co. v. *Oregon, etc., Ry. Co.*, 57 Fed., 673 and 676.

Little Rock, etc., R. R. v. *East. Tenn., etc., R. R.*, 47 Fed., 771 and 775.

Manheim Ins. Co. v. *Erie W. Trans. Co.*, 75 N. W., 602.

And subdivision 10 of argument.

(f) The commission erred in its conclusion under the facts that a tonnage pool of this traffic as between connecting carriers not defendants was established.

See

Subdivision VI of argument.

II.

THE SUPPOSED RIGHT OF THE SHIPPER TO ROUTE IS NEITHER RECOGNIZED NOR PROTECTED BY ANY PROVISION OF THE INTERSTATE COMMERCE ACT. IT IS PURELY A MATTER OF AGREEMENT.

Hastings v. *Pepper*, 11 Pick., 43.

Snow. v. *I. B. & W. R. R. Co.*, 109 Ind., 422, 425; s. c., 9 N. E., 702 and 703.

C. I. & L. R. R. Co. v. *Woodward*, 72 N. E., 558.

White v. *Ashton*, 51 N. Y., 280, 284.

Hinckley v. *N. Y. C. & H. R. R. Co.*, 56 N. Y., 429, 433, 434.

Ind. R. R. Co. v. *Remy*, 13 Ind., 518.

Patten v. *U. P. R. R. Co.*, 29 Fed., 591.

Post. v. *So. Ry.* 103 Tenn., 220; s. c., 52 S. W., 301.

Lowe v. *Seaboard Air Line Ry. Co.*, 41 S. E., 297.

III.

AS THE ASSERTION OF THE RIGHT TO ROUTE BY THE INITIAL CARRIER CONTRARY TO THE WISHES OF THE SHIPPER IS NOT "SOMETHING DONE OR OMITTED TO BE DONE IN VIOLATION OF THE PROVISIONS" OF THE INTERSTATE COMMERCE ACT, OR ANY LAW COGNIZABLE BY THE COMMISSION, THE COMMISSION HAD NO AUTHORITY TO MAKE THE ORDER IN QUESTION SINCE ITS POWER AND JURISDICTION IS CONFINED TO INVESTIGATIONS CONCERNING SOMETHING DONE OR OMITTED TO BE DONE IN VIOLATION OF THE PROVISIONS OF THAT LAW.

Sections 13, 14 and 15 Interstate Commerce

Law, pages 3164 and 3165 U. S. Compiled Statutes, 1901, Vol. 3.

Wannan v. *Scottish Cent. Ry. Co.*, 1 Nev. & MacN. (Railway and Canal Traffic Cases), 237, 241 and 242.

Bennett v. *Manchester, S. & L. Ry. Co.*, 1 Railway and Canal Traffic Cases, 288; s. c., 6 C. B. (N. S.), 707.

IV.

AGREEMENTS BETWEEN CONNECTING CARRIERS CONCERNING THE MAKING OF JOINT RATES AND CONDITIONS APPLICABLE THERETO ARE PURELY MATTERS OF VOLUNTARY AGREEMENT BETWEEN SUCH CARRIERS.

Kentucky & I. Bridge Co. v. *L. & N. Ry. Co.*, 37 Fed., 629, 630 and 633.

Elliott on Railroads, Vol. 4, Sec. 1685.

Little Rock, etc., R. R. v. *St. Louis, etc., Ry. et al.*, 41 Fed., 559.

Little Rock, etc., R. R. v. *St. Louis, I. M., etc., R. R.*, 59 Fed., 400; s. c., in C. C. A., 63 Fed., 775.

Oregon Short Line, etc., R. R. v. *Nor. Pac. R. R.*, 51 Fed., 465; affirmed in C. C. A., in 61 Fed., 158.

St. Louis Drayage Co. v. *L. & N. R. R. Co.*, 65 Fed., 39.

Prescott, etc., R. R. v. *A., T. & S. F. Ry.*, 73 Fed., 438.

G. C. & S. F. Ry. v. *Miami S. S. Co.*, 86 Fed., 407.

L. & N. R. R. v. *West Coast, etc., Co.*, 198 U. S., 497, 498.

V.

BEYOND THE REQUIREMENT THAT SUCH AGREEMENTS OR TARIFFS SHALL BE FILED WITH THE COMMISSION AND THE TARIFFS MAY BE REQUIRED TO BE PUBLISHED AS THE COMMISSION MAY DETERMINE, THEY ARE NOT SUBJECT TO ANY REGULATION OR CONTROL BY THE COMMISSION; NOR ARE THEY OTHERWISE AFFECTED BY ANY PROVISION OF THE INTERSTATE COMMERCE ACT. NO PROVISION IN THAT LAW FORBIDS OR MAKES UNLAWFUL THE ROUTING PROVISION WHICH WAS IMPOSED BY THE INITIAL CARRIERS AS A CONDITION OF THEIR MAKING OR ENTERING INTO THE JOINT RATE IN QUESTION.

Section 6 Interstate Commerce Law, p. 3157 U. S. Compiled Statutes, 1901, Vol 3.

Int. Com. Com. v. *R. R. Co.*, 167 U. S., 504, 505 and 506.

See subdivision II of argument.

C. N. O. & T. P. R. R. v. *Int. Com. Co.*, 162 U. S., 197.

Nicholson et al. v. *Great Western R. R.*, 7 C. B. (N. S.), 755; s. c., 1 Nev. & MacN., 149.

Int. Com. Com. v. *Alabama Midland Ry.*, 74 Fed., 723, 724.

Int. Com. Com. v. *Western & A. R. R.*, 93 Fed., 91.

Int. Com. Com. v. *Western & A. R. R.*, 88 Fed., 196.

VI.

NEITHER THE COMMISSION NOR THE COURT COULD MAKE A DIFFERENT AGREEMENT OR CONTRACT FOR THESE CARRIERS THAN THE ONE MADE BY SUCH CARRIERS AND THE ATTEMPT OF THE COMMISSION TO KEEP IN FORCE THE JOINT RATE AN STRIKE OUT THE CONDITION OR CONSIDERATION THEREFOR WOULD BE EQUIVALENT TO MAKING A NEW AGREEMENT FOR THE PARTIES WHICH THEY DID NOT DESIRE TO MAKE.

Little Rock, etc., R. R. v. *St. Louis, etc., R. R.*, 63 Fed., 779, 780.

Southern Pacific Co. v. *C. F. & I. Co.*, 101 Fed., 779, 786.

Little Rock, etc., R. R. v. *St. Louis, etc., R. R.*, 41 Fed., 559.

Pullman Car Co. v. *Mo. Pac. Ry.*, 115 U. S., 587.

A., T. & S. F. Ry. v. *D. & N. O. R. R.*, 110 U. S., 682, 683.

Express Cases, 117 U. S., 1, and 29.

VII.

ANY RESTRICTION UPON THE SUPPOSED RIGHT OF THE SHIPPER TO DIVERT HIS SHIPMENT WHILE IN TRANSIT WOULD NOT BE IN VIOLATION OF THE INTERSTATE COMMERCE LAW. THE PRIVILEGE OF DIVERTING THIS TRAFFIC, AS PRACTICED BY THE SHIPPERS THEREOF, WAS MERELY A CONCESSION GRANTED BY THE CARRIERS TO WHICH THE SHIPPERS WERE NOT ENTITLED AS A MATTER OF RIGHT.

Pinnix v. *C. & S. R. R.*, 66 N. C., 34 and 41.

Ellis v. *Willard*, 9 N. Y., 529.
Violett v. *Stettinius*, 5 Cranch. (C. C.), 559; 28 Fed. Cas. No. 16,953.
Braithwaite v. *Power*, 48 N. W., 354.
Hutchinson on Carriers (2 Ed.), Sec. 444a.
See subdivision IV of argument.

VIII.

THE INITIAL CARRIERS SHOULD HAVE THE RIGHT TO ROUTE UNDER THE JOINT TARIFFS OR JOINT THROUGH RATES. THE CONDITION IN QUESTION WAS LAWFUL AND VALID AND FACILITATED TRANSPORTATION.

See reasons set forth in
Post v. *So. Ry. Co.*, 103 Tenn., 220; s. c., 52 S. W., 301.
Subdivision V of argument.

IX.

THE EVIDENCE CLEARLY SHOWS THAT THE ROUTING PROVISION WAS PUT INTO JOINT TARIFFS AT THE INSTANCE ALONE OF THE INITIAL CARRIERS IN ORDER TO PUT A STOP TO ILLEGAL PRACTICES OF CERTAIN CONNECTING CARRIERS IN PAYING UNLAWFUL REBATES, PARTICULARLY TO THE TWO COMPLAINANTS BEFORE THE COMMISSION. IT WAS NOT THE RESULT OF ANY AGREEMENT BETWEEN ANY COMPETING CONNECTING CARRIERS TO EFFECT A DIVISION OF THIS TRAFFIC BETWEEN THEM UPON AN AGREED RATIO OR BASIS. CONNECTING CARRIERS WERE NOT ADVISED AS TO HOW THIS TRAFFIC WAS OR WOULD BE DIVIDED OR ROUTED OVER CONNECTING LINES.

See evidence referred to at large in the opinion of the lower court.

See, also, Sproule, 917, 918, 919, 923, 931 to 933; Ripley, 821-2; Morton, 122, 125, 126, 127, 129; Chambers, 209, 888-890, 893, 894; Bissell, 863-4; 869-70, 875-6, 878-9; Barnwell, 414 to 424, 440, 443; Parkyns, 233-4, 272.

X.

IT WAS NOT ALLEGED IN THE COMPLAINTS BEFORE THE COMMISSION THAT THE ROUTING PROVISION WAS ADOPTED TO CARRY OUT ANY PRETENDED ILLEGAL AGREEMENT BETWEEN THE CONNECTING LINES; NOR DID THE COMMISSION CONCLUDE THAT THE ARRANGEMENT WAS ILLEGAL UNDER THE POOLING CLAUSE OF THE INTERSTATE COMMERCE LAW.

See paragraphs X, XII, and XIV of Complaint, Record pages 16, 17 and 18, and Conclusion in report of Commission, found in Record, p. 74.

See, also, subdivision VI of argument.

XI.

SECTION 5 OF THE INTERSTATE COMMERCE ACT DOES NOT PROHIBIT A MERE DIVISION OF TRAFFIC BETWEEN CONNECTING LINES, EVEN IF COMPETITIVE. IT ONLY CONCERNS AGREEMENTS FOR A DIVISION OF RECEIPTS OR EARNINGS WHICH ARE TO BE COMBINED OR POOLED AND AFTERWARDS DISTRIBUTED UPON AN AGREED PROPORTION OR RATIO.

Sec. 5 Interstate Commerce Law, p. 3156 U. S. Compiled Statutes, 1901, Vol. 3.

Subdivision VII of argument.

U. S. v. *Trans. Missouri Frt. Association,* 58 Fed., 65.

XII.

THE WORD "FREIGHTS" IN SECTION 5 HAS A MEANING AKIN TO "EARNINGS" AS IT IS USED IN THE SAME CONNECTION.

Vol. 4 Words and Phrases Judicially Defined, pp. 2973, 2974, 2975 and 2976.

3 Kent's Comm. (12th Ed.), p. 219.

The Main v. *Williams,* 152 U. S., 129.

Giles et al. v. *The Cynthia,* 1 Pet. Admr., 203; Case No. 5424, Vol. 10 Federal Cases, pp. 369, 370.

Poland et al. v. *The Spartan,* 1 Ware, 130; Case No. 11, 246; Vol. 19 Federal Cases, pp. 912, 914.

Lord v. *Neptune Ins. Co.,* 10 Gray, 112, 113.

It is associated with "earnings" and has kindred meaning.

Shenley's Appeal, 70 Pa. St., 101, 102.

Hadley v. *Perks,* L. R., 1 Q. B., 455.

Lewis' Sutherland on Statutory Construction, Secs. 414, 415 and 416.

Holman's Appeal, 106 Pa. St., 502, 507.

Newport News Co. v. *U. S.,* 9 C. C. A., 579; s. c., 61 Fed., 488.

XIII.

THERE WAS NO CASE STATED IN THE REPORT OF THE COMMISSION OF ANY UNDUE PREFERENCE EXISTING AS BETWEEN SHIPPERS OR IN RESPECT TO THIS TRAFFIC AS COMPARED WITH OTHER TRAFFIC, IF ANY, IN COMPETITION. THE EVIDENCE SHOWS THAT THIS TRAFFIC WAS GIVEN A PREFERENCE IN MANY RESPECTS OVER ALL OTHER KINDS OF TRAFFIC.

XIV.

TO JUSTIFY A FINDING OF UNDUE PREFERENCE EITHER AS BETWEEN SHIPPERS OR TRAFFIC IT MUST BE SHOWN THAT THEY COME IN COMPETITION WITH EACH OTHER SO THAT INJURY RESULTS TO THE ONE BY REASON OF THE PREFERENCE GIVEN THE OTHER.

See Subdivision VIII of Argument.

Int. Com. Com. v. *B. & O. R. R.*, 43 Fed., 37.

U. S. v. *C. & N. W. Ry.*, 127 Fed., 785.

Hozier v. *Caledonian Ry.*, 1 Nev. & MacN., 27.

Int. Com. Com. v. *B. & O. R. R.*, 145 U. S., 282, 283, 284.

Nicholson v. *Great Western Ry.*, 1 Nev. & MacN., 150.

Lees, et al., Lancashire, etc., R. R., 1 Nev. & MacN., 352, 366.

Nicholson, et al. v. *Great Western Ry.*, 1 Nev. & MacN., 121.

The Law Relating To Railway And Canal Traffic by Boyle & Waghorn, Vol. 1, pp. 158, 159.

Phipps, et al. v. *London & N. W. R. R.*, Law. Rep., Q. B. Div., 1893, Vol. 2, p. 236.

XV.

AS THE INITIAL CARRIER, BY MAKING A JOINT RATE WHICH UNDER THE LAW IT COULD NOT BE COMPELLED TO MAKE, AFFORDS THE SHIPPER A CONCESSION, IT HAS THE RIGHT TO STIPULATE FOR THE CONSIDERATION OR CONDITION UPON WHICH SUCH JOINT RATE SHALL BE OFFERED, AND IN IMPOSING THIS CONDITION IT DID NOT GIVE ITSELF AN UNJUST ADVANTAGE OR SUBJECT THE SHIPPERS OF THIS TRAFFIC TO AN UNDUE DISADVANTAGE. IT IS IDENTICAL WITH A CASE IN WHICH THE CARRIER AFFORDS TO THE SHIPPER RATES FOR CARRIAGE AT "OWNER'S RISK" MUCH LESS THAN RATES APPLICABLE TO CARRIAGE AT "CARRIER'S RISK."

Manheim Ins. Co. v. *Erie W. Trans. Co.*, 75 N. W., 602.

Post v. *Southern Ry. Co.*, 103 Tenn., 220; s. c., 52 S. W., 301.

See Argument.

XVI.

THE JOINT THROUGH RATE IS APPLICABLE WHERE THE CARRIER EXERCISES THE RIGHT TO ROUTE. THE SUM OF THE LOCALS IS THE THROUGH RATE APPLICABLE WHERE THE SHIPPER EXERCISES THE RIGHT TO ROUTE.

See Opinion of Lord Esher in *Didcot, etc., R. R.* v. *Gt. Western Ry.*, 10 Railway & Canal Traffic Cases, 5.

Also opinion of Rigby, L. J., in same case, pp. 7 and 8.

XVII.

THE ORDER OF THE COMMISSION IS TOO BROAD TO BE SUPPORTED UPON THE GROUND THAT AN UNDUE PREFERENCE MIGHT BE MADE BY THE CARRIER OR UPON THE GROUND THAT THE ROUTING PROVISION WAS ADOPTED TO EFFECTUATE A DIVISION OF TRAFFIC BETWEEN CONNECTING CARRIERS. THE ORDER IS NOT RESPONSIVE TO OR CONFINED TO ANY FINDINGS IN THE CASE UPON THE POINTS STATED IN THE REPORT OF THE COMMISSION AND IS THEREFORE UNLAWFUL.

D. G. H. & M. R. R. v. *Int. Com. Com.*, 74 Fed., 803, 840, and 841.

East. Tenn. R. R. v. *Int. Com. Com.*, 181 U. S., 1, 23 and 26.

XVIII.

THE ORDER IN QUESTION IS UNLAWFUL BECAUSE LEGISLATIVE IN ITS NATURE. IT IS NOT CONFINED IN FAVOR OF THE COMPLAINANTS NOR TO THE CASE BEFORE THE COMMISSION BUT IT IS INTENDED GENERALLY TO CONTROL THE CONDUCT OF THE CARRIERS IN ALL FUTURE CASES AND CONTROVERSIES AND IS SUCH AN ORDER AS THE COMMISSION HAS NO AUTHORITY TO MAKE.

See Argument, Subdivision XI.

Int. Com. Com. v. *C. N. O., etc., R. R.*, 76 Fed., 184.

Farmers' L. & T. Co. v. *Nor. Pac. R. R.*, 83 Fed., 268.

Int. Com. Com. v. *Railway Co.*, 167 U. S., 501.

Int. Com. Com. v. *Alabama, etc., R. R.*, 168 U. S., 161, 162.

Texas & Pac. R. R. v. *Int. Com. Com.*, 162 U. S., 216.

XIX.

THE RESULT OF THE ORDER IS TO GIVE TO THE COMPLAINANTS BEFORE THE COMMISSION RELIEF WHICH WOULD BE DENIED TO THEM ON ACCOUNT OF THEIR UNCONSCIONABLE AND INEQUITABLE CONDUCT, AND IT AFFORDS THEM AN OPPORTUNITY IN THE FUTURE TO CONTINUE THEIR ILLEGAL PRACTICES OF SOLICITING AND ORTAINING UNLAWFUL REBATES FROM CONNECTING LINES. IT WOULD BE INEQUITABLE TO GRANT THEM SUCH RELIEF.

Post v. *So. Ry.*, 103 Tenn., 220; s. c., 52 S. W., 301.

XX.

THE ENGLISH STATUTES, IN FORCE PRIOR TO THE ENACTMENT OF THE INTERSTATE COMMERCE LAW, SPECIFICALLY EMPOWERED THE COURT OF COMMON PLEAS OR ONE OF THE JUDGES THEREOF, AND AFTERWARDS THE RAILWAY AND CANAL COMMISSION, TO MAKE SPECIFIC ORDERS OF AN INJUNCTIVE NATURE UPON SPECIFIC COMPLAINTS AGAINST CERTAIN CARRIERS.

Sec. 3, English Railway and Canal Traffic Act of July 10, 1854, found on page 2, 1 Nev. & MacN.

English Act of July 21, 1873, Sec. 6, found on page 6, 1 Nev. & MacN., see also, page 12; and Sec. 29.

English Act of August 10, 1888, found in 6 Railway and Canal Traffic Cases, page xviii.

XXI.

IT IS TO BE PRESUMED THAT WITH THIS LEGISLATION BEFORE IT CONGRESS, BY OMITTING TO MAKE SUCH SPECIFIC PROVISIONS, DID NOT INTEND TO VEST THE COMMISSION WITH POWER TO MAKE SUCH ORDERS.

XXII.

THE POWERS OF THE COMMISSION FOUNDED ON THIS STATUTE ARE LARGELY ADVISORY. IT IS ALSO CREATED AS AN INSTRUMENTALITY BY THE LEGISLATURE TO FIND AND STATE EVIDENCE IN SUPPORT OF COMPLAINANTS FOR DAMAGES, THUS ENABLING SHIPPERS TO READILY SUPPORT THEIR CLAIMS IN COURT.

Board of Railroad Commissioners v. *Oregon Ry. & Nav. Co.*, 19 Pac., 702, 704, 706 and 707.

People v. *N. Y. L. E. W. R. R.*, 104 N. Y., 58, 66 and 67; 9 N. E., 856.

No. Pac. R. R. v. *Dustin*, 142 U. S., 503.

State, ex rel. v. *Mo. Pac. R. R.*, 55 Kas., 708; 41 Pac., 964.

XXIII.

IN CONSTRUING STATUTES CONFERRING SPECIAL POWER OR AUTHORITY UPON A BOARD OR TRIBUNAL NOTHING IS PRESUMED WHICH IS NOT EXPRESSLY GIVEN, AND IN THE EXERCISE OF SUCH SPECIAL POWER SUCH BOARD OR TRIBUNAL IS PRECISELY LIMITED TO THAT SPECIFICALLY GRANTED.

Lewis' Sutherland on Statutory Construction (2nd Ed.), Secs. 562, 564, 565, 567, and 568.

XXIV.

IN THIS PROCEEDING THE FEDERAL COURTS HAVE NO POWER OR AUTHORITY TO MAKE ANOTHER OR DIFFERENT ORDER THAN THAT MADE BY THE COMMISSION, OR TO MODIFY THE ONE MADE.

Int. Com. Com. v. *L., & N. R. R.*, 73 Fed., 409.

Int. Com. Com. v. *D., L. & W. R. R. Co.*, 64 Fed., 723.

D. G. H. & M. R. R. v. *Int. Com. Com.*, 74 Fed., 803, 841.

Farmers' L. & T. Co. v. *N. P. R. R. Co.*, 83 Fed., 249.

Int. Com. Com. v. *West. N. Y., etc., R. R. Co.*, 82 Fed., 192.

XXV.

THE ORDER OF THE COMMISSION WAS INVALID BECAUSE THE CONNECTING CARRIERS WERE NOT MADE PARTIES TO THE PROCEEDINGS BEFORE THE COMMISSION AND THE COMMISSION HAD NO POWER TO ADJUDICATE THE PROVISION IN THE JOINT TARIFF AGREEMENT TO BE INVALID WITHOUT HAVING BEFORE IT THE CONNECTING CARRIERS WHO WERE PARTIES TO THAT AGREEMENT AND GIVING THEM AN OPPORTUNITY TO BE HEARD THEREON.

A COURT OF EQUITY COULD NOT ENTERTAIN JURISDICTION IN SUCH A CONTINGENCY, NEITHER COULD THE COMMISSION MAKE AN ADJUDICATION OR ORDER DECLARING INVALID THE JOINT TARIFF AGREEMENT AND THUS AFFECTING RIGHTS OF PARTIES WHO WERE NOT BEFORE THE COMMISSION. AND THEN SEEK TO MAKE SUCH AN ORDER FINAL AND CONCLUSIVE BY THE DECREE OF A COURT OF EQUITY. IT WOULD BE INEQUITABLE FOR THE COURT TO ENFORCE SUCH AN ORDER.

California v. *So. Pac. Co.*, 157 U. S., 229, 249, and 251.

U. S. v. *Nor. Pac. R. R.* 134 Fed., 715; (C. C. A., 8th Circuit).

Cons. Water Co. v. *City of San Diego*, 93 Fed., 849 and 852.

Western N. Y. R. R. Co. v. *Penn. Rfg. Co.*, 137 Fed., 358.

ARGUMENT.

I.

THE JURISDICTION OF THE COURT IN THIS PROCEEDING IS PREDICATED WHOLLY UPON THE LAWFULNESS OF THE ORDER OF THE COMMISSION.

The jurisdiction of the Circuit Court in this proceeding is had under Section 16 of the Interstate Commerce Law on the petition of the plaintiff to enforce a "lawful order or requirement of the commission." The lawfulness of the order of the commission is now made the subject of judicial investigation and determination.

To determine whether the order of the commission sought to be enforced by the mandatory injunction of the court be lawful or not it must be ascertained.

First. Is the order one which the commission had the power and authority under the provisions of the Interstate Commerce Law to make?

Second. Is the order *prima facie* legally authorized or justified under the "findings of fact" set forth in the report of the commission,—are such "findings" sufficient to warrant the making of the order? If not, it is evident on the face of the report that the commission have erred in applying the law to the case before them and their order should not be enforced by the courts. (*L. & N. Rld.* v. *Behlmer*, 175 U. S., 674, 675 and 676.)

Third. Is the order, in case of dispute such as

would be warranted under the facts finally ascertained to be the true facts by the court, allowing a *prima facie* effect, as evidence, to the "findings" of the commission? For if, on a trial, such facts should be shown to the court as would show that the order in question was unwarranted and not justified under any provision of this law relied upon by the commission, then the order is shown to be erroneous and invalid.

Fourth. If it appear from the report and conclusions of the commission that they have misconstrued or misapplied the provisions of this law, in coming to their determination, and upon which their order is based, then such order is erroneous and invalid.

See,

Int. Com. Com. v. *Lehigh Valley R. R.*, 74 Fed., 784.

D. G. H. & M. R. R. v. *Int. Com. Com.*, 74 Fed., 803.

Int. Com. Com. v. *D., L. & W. Rld.*, 64 Fed., 723.

East Tenn. etc., R. R. v. *Int. Com. Com.*, 181 U. S., 1.

The decision and order of the commission are based upon the following assumptions.

First. That the provisions in the joint tariff investing the initial carrier with the exclusive right to route shipments is in violation of the sixth section of the Interstate Commerce Law; that joint tariff rates make joint routes and that the shipper has the right himself under this law to select any one of such routes and ship under the joint rates, ignoring the provision

or condition of the agreement upon which joint rates are made. (This involves a construction of that section of that law, which, however, was not adopted by the lower court in its decision.)

Second. That the practice of the defendants, the initial carriers, in the application of this reserved right to route in respect to citrus traffic, "subjects the owners and shippers thereof to undue, unjust and unreasonable prejudice and disadvantage *and* gives the carrier an undue and unreasonable preference and advantage." (This involves a construction of Section 3 of the Interstate Commerce Law, and the question whether the order itself is properly limited to any concrete case involved. It may also involve a consideration of the evidence as to whether such shippers are in fact subjected to an undue and unreasonable prejudice and disadvantage, as above stated. The lower court did not find such to be the facts or the law.)

Third. That it appeared "that a tonnage pool of this traffic as between the connecting carriers *not defendants* was established, and that the defendants so controlled the routing as to give specified percentages of this traffic to their several connections, thereby fulfilling and giving effect to this unlawful and forbidden arrangement." (This involves a consideration of the evidence and the findings of the commission in that respect, and possibly a construction of Section 5 of the Interstate Commerce Law. While the commission did not conclude that there was a violation of that section yet the lower court deduced from the evidence quoted in its opinion that the arrangement involved in the making of the particular joint tariff was

violative of that section, and sustained the order on that ground.)

II.

THE SUPPOSED RIGHT OF THE SHIPPERS TO ROUTE IS NEITHER RECOGNIZED NOR PROTECTED BY ANY PROVISION OF THE INTERSTATE COMMERCE LAW AND THEREFORE THE ASSERTION OF SUCH RIGHT TO ROUTE IN THE INITIAL CARRIER CONTRARY TO THE WISHES OF SHIPPERS IS NOT "SOMETHING DONE OR OMITTED TO BE DONE IN VIOLATION OF THE PROVISIONS" OF THAT LAW OR ANY OTHER LAW COGNIZABLE BY THE COMMISSION.

In its inquiries concerning complaints, and in the determination thereof, the commission is very plainly limited to the investigation of cases in which "*something has been done or omitted to be done in violation of the provisions*" *of that law,* and its orders must necessarily be confined to such cases, if any.

In section 13 of that law it is provided that any person, association, etc., "complaining of *anything done or omitted to be done by any common carrier, subject* to the provisions of this act, *in contravention of the provisions thereof,* may apply to said commission by petition, which shall briefly state the facts, etc." Notice of such complaint is then to be given by the commission to the carrier and if the complaint be not satisfied and there appears to be reasonable ground for investigating such complaint, it is then made the duty of the commission to investigate the matter complained of.

In section 14 it is provided that when an investigation shall be made by the commission,

"it shall be its duty to make a report in writing in respect thereto, which shall include the *findings of fact* upon which the *conclusions* of the commissions *are based*, together with its recommendation as to what reparation, if any, should be made by the common carrier to any party or parties who may be found *to have been injured;* and *such findings* so made shall thereafter, in all judicial proceedings, be deemed *prima facie* evidence as to each and every fact found."

In section 15 it is provided that:—

"If in any case in which an investigation shall be made by said commission it shall be made to appear to the satisfaction of the commission, either *by the testimony of witnesses or other evidence*, that anything *has been done or omitted to be done in violation of the provisions of this act, or of any law cognizable by said commission*, by any common carrier, or that any injury or damage *has been sustained by the party or parties* complaining, or by other parties aggrieved in consequence of any *such violation*, it shall be the duty of the commission to forthwith cause a copy of its report in respect thereto to be delivered to such common carrier, together with a *notice* to said common carrier to *cease and desist from such violation*, or to make reparation for the injury so found *to have been done*, or both, within a reasonable time, to be specified by the commission; and if, within the time specified, it shall be made to appear to the commission that such common carrier has ceased from such violation of law, and has made reparation for the injury found to have been done, in compliance with the report and notice of the commission, or to the satisfaction of the party coplaining, a statement to that effect shall be entered of record by the commission, and *the said common carrier shall thereupon be relieved from further liability or penalty for such particular violation of law.*"

If the commission has the power to make any or-

der or requirement in the premises, clearly such order or requirement should be confined to prohibiting *something done or omitted to be done in violation of the provisions of this law by the carrier.* The power of the commission in respect to its determinations or recommendations is defined by this section.

The commission could not entertain a complaint against a carrier for damages arising out of its failure or refusal to route a particular shipment as requested by the shipper, as such matter is not provided for in this law. Neither can it, then, in the first instance, by an order, prohibit the carrier from exercising the reserved right in the joint tariffs to route, or from carrying out the provisions of such tariffs in respect thereto. It was held, under the English statute somewhat similar to ours that complaints thereunder must be confined to violations of such statute.

In *Wannan* v. *Scottish Central Railway Company*, 1 Nev. & MacN. (Railway and Canal Traffic Cases), 237; s. c., 2 Sess. Ca., 1373, 3rd ser., averments that a railway company refused to give effect to general orders left with it to deliver goods arriving at its stations by a particular carrier, and that the company refused to hand over goods for delivery by a particular carrier in whose care they were addressed: Held, no relevant allegations of a contravention of the undue preference clause and, therefore, not sufficient to warrant the summary procedure provided for in the act. Lord Justice Clerk, Inglis, said:

"I do not think that the question here raised by the petitioner admits of any doubts, and I have, without the slightest difficulty, arrived at the conclusion that we ought to dismiss his application. The petition is

competent only under the Railway Traffic Act, and if it is not a relevant and good complaint of *something done or omitted to be done by the railway company in contravention of that act, then it is not a competent petition.*"

On pages 241 and 242 he continues:

"Then, with regard to the other branch of the petitioner's case. It is this, that the Scottish Central Railway Company, in the prosecution of malicious feelings against their old servant, the petitioner, refused to deliver to him goods specially consigned for delivery to him, and delivered them to someone else. Now there can be no doubt that this is a relevant ground for action, but it is not a relevant ground of complaint under this act; because if a company receive goods from a consignor to be delivered to a certain consignee, and decline to fulfil that contract, that is a simple breach of contract of the common carriage, and not a case under the Railway Traffic Act."

See, also,

Bennett v. *Manchester, Sheffield and Lincolnshire Ry. Co.*, 1 Railway and Canal Traffic Cases, 288; s. c., 6 C. B. (N. S.), 707.

Is, then, the enforcement by the initial carriers of the provision in the joint tariffs, giving them the exclusive right to route, *something "done or omitted to be done in violation"* of that law? It will not be pretended that the Interstate Commerce Law recognizes or seeks to protect any supposed right of a shipper to route his shipment. No provision of that law can be pointed to which prohibits the carriers from routing or from bargaining for the privilege. The commission, however, argues that this joint tariff provision is in violation of section 6; that the voluntary making of joint through rates is the establishment of continuous lines over which such rates apply, and that the

rates cannot be increased or decreased, except upon a certain number of days' notice, although it must be admitted that if the joint tariff agreement has no fixed period, any party thereto may withdraw therefrom or cancel the same at pleasure at any time. In this case there has been no attempt to charge any shipper a greater rate than that specified in the tariffs wherever the shipment is made under or in pursuance of the provisions of the joint tariff agreement. Where shipped under other or local tariffs, the rates therein apply. The shipper is at liberty to ship under the joint tariffs and the rates therein prescribed, or not, as he may please,—it is always optional with him to do so. It is simply insisted that where he does make a through shipment under a joint rate, which is lower than the sum of the locals, he ship and accept such lower rate upon the condition on which it is made by the agreement of the carriers and thus offered him.

If he does not like this condition he is not obliged to accept the same, but may ship at the sum of the locals, and the routes or lines are just as continuous for shipment or carriage in the one case as in the other.

The joint rate is the through rate where the initial carrier routes, and the sum of the locals is also a through rate where the shipper routes. A through rate may be the one thing or the other—a joint rate fixed by agreement of connecting carriers, or the sum of the locals.

See,

Opinion of Lord Esher, in *Didcot, &c. Ry. Co.* v. *Great Western, &c. Ry. Co.*, 10 Ry. & Canal Traffic Cas., 5; also,

Opinion of Rigby, L. J., in same case, pp. 7 and 8.

Carriers may lawfully impose one rate for goods shipped at "Carrier's risk," and a lower rate for the same kind when shipped at "Owner's risk."

Mannheim Ins. Co. v. *Erie W. Trans. Co.*, 75 N. W., 602.

So, in case of routing, the through rate is ascertained or determined according to the conditions under which the shipment is made just as in cases where it moves under bills of lading releasing the carriers from certain risks or where it moves at "carrier's risk." The tariff rates are not departed from but adhered to, and a shipper is charged no more than the rates specified in the tariffs applicable to such shipment. In this the 6th section is followed, not violated.

The Interstate Commerce Law does not require or enforce the making of joint tariffs, but, on the contrary, recognizes that they are, as at common law, solely a mater of private arrangement or agreement between the connecting carriers.

In section 6 it is provided:

"Every such common carrier shall also file with said commission copies of all contracts, agreements or arrangements with other common carriers in relation to any traffic affected by the provisions of this act to which it may be a party. And in cases where passengers and freight may pass over continuous lines or routes operated by more than one common carrier, *and* the several common carriers operating such lines or routes establish joint tariffs or rates or fares or charges for such continuous lines or routes, copies of such joint tariffs shall also, in like manner, be filed with said commission. Such joint rates, fares and charges on such continuous lines so filed as aforesaid shall be made public by such common carriers when directed by said commission, insofar as may, in the

judgment of the commission be deemed practicable; and said commission shall, from time to time, prescribe the measure of publicity which shall be given to such rates, fares and charges, or to such part of them as it may deem it practicable for such common carriers to publish, and the places in which they shall be published."

This provision recognizes that there may be continuous lines or routes over which freight passes and there may or may not be joint tariffs in respect to the same, and provision is simply made in case joint tariffs are made for the filing and publication of the same.

Further on it is provided, in the same section:

"The commission may determine and *prescribe the form* in which the *schedules* required by this section to be kept open to public inspection shall be *prepared and arranged* and may change the *form* from time to time as shall be found expedient."

Provision is also made forbidding advances or reductions in the joint rates, except after a certain number of days' notice to the commission, though there is nothing to prohibit the carriers from cancelling the same at pleasure. It is also made unlawful for the carrier to deviate from the tariff while in force.

This section deals only with *rates and charges between points of shipment.* It does not concern the selection of routes between those points. *The joint tariffs themselves only concern and set forth rates applicable between points of origin and destination.*

The routes are not designated therein. Only the companies parties to the rates are mentioned. *All that the shipper is entitled to is the rate prescribed therein if he ship under the tariffs.*

The power of the commission in respect to such joint tariffs is here very clearly defined. It has no power to prescribe what shall or shall not be contained in the joint agreements, nor what the provisions thereof shall be. It is therefore, well stated in *Interstate Commerce Commission* v. *Railway Company*, 167 U. S., 504, 505, as follows:

"Not only are there these provisions in reference to the tariff upon its own line, but further when two carriers shall unite in a joint tariff (and such union is nowhere made obligatory, but is simply permissive), the requirement is *only* that such joint tariff shall be filed with the commission, and *nothing but the kind and extent of the publication thereof is left to the discretion of the commission.*"

On page 506 it is further said:

"The grant to the commission of the power to prescribe the form of the schedules and to direct the place and manner of publication of joint rates, *thus specifying the scope and limit of its function in this respect*, strengthens the conclusion that the power to prescribe rates or fix any tariff for the future is not among the powers granted to the commission."

In other words, by specifically expressing the power of the commission over joint tariffs in certain particulars, Congress necessarily intended to exclude any power over such agreements, and the parties thereto, in other respects. *Expressio unius est exclusio alterius.*

There is a marked difference between this law which intentionally omitted giving the commission power to make provisions concerning joint tariff rates, and the Minnesota statute which invested the Railroad Commission of that state with specific power over such tariffs, and which was considered by this court in *Minne-*

apolis, &c. Ry. v. *Minnesota*, 186 U. S., 257. That case was relied on by the other side in the lower court.

Joint tariffs do not make continuous lines or routes under the provisions of this law, for lines or routes are, as they always were, continuous if traffic may pass over the same whether there be any joint rates or not in force over them. Continuous lines were recognized and specifically mentioned in Sec. 5257 Revised Statutes, U. S., enacted in 1866, without any reference to joint tariffs. *The carriers are at liberty now, as they were before this act, to make joint rates in respect to some commodities or kinds of traffic and decline to make joint rates in respect to others, in which latter case the sum of the locals would apply. In respect to some they may not be able to agree as to the rate or the division thereof.* It is altogether a matter of voluntary agreement. Being a matter of voluntary agreement, it is evident that the commission cannot make one for the parties different from that which they desire to make or be bound by. Yet this is just what he commission attempted to do.

That it is purely a matter of private arrangement or agreement between the carriers themselves is not only apparent from the foregoing provision, but it has been frequently so decided. With the exception of requiring such joint agreements and tariffs to be filed and published, if the commission shall so require, the law leaves the carriers as free as they were at common law to determine the terms and conditions of such joint contracts or arrangements. That was the view taken by the late and distinguished Mr. Justice Jackson in the case of *Kentucky & I. Bridge Company* v. *L. & N. Ry. Co.*, 37 Fed., in his opinion on pages

629 and 630. See, also, page 633. On page 630 he quotes with approval from a report of the commission, as follows:

"'If companies can agree upon their tariffs, the form of their tickets, and how they shall be sold, they have the right to do so, and by such agreement become interstate carriers; but if they cannot agree, the act does not undertake to coerce them to do business together upon terms that may be justly objectionable or injurious.'"

He then continues:

"It will hardly be insisted that a different rule applies in respect to through freight traffic, *and joint through rates or charges, the arrangement for which,* as well as the forms of the bills of lading and the apportionment to be made of such joint tariff rates, and of losses or damage to freights in course of transit, *are all matters of private agreement.* Such arrangements, which usually include the reciprocal interchange of cars, and the use of each other's tracks and terminal facilities, are prompted by considerations varied and complex, as shown in the above statement of facts."

In Elliott on Railroads, Vol. 4, Sec. 1685, it is stated, referring to this law:

"It is, perhaps, safe to say that, subject to the prohibitions against unjust or unreasonable charges and against unjust discrimination, railroad companies are free to make contracts respecting the interchange of freight."

See, also,

Little Rock, etc. R. Co. v. *St. Louis, etc. R'y Co., et al.*, 41 Fed., 559.

Little Rock & M. R. Co. v. *St. Louis, I. M. S. Ry. Co.*, 59 Fed., 400; s. c., in C. C. A., 63 Fed., 775.

Oregon Short Line, etc. Ry. Co. v. *Northern*

Pacific Ry. Co., 51 Fed., 465; affirmed in C. C. A., in 61 Fed., 158.

St. Louis Drayage Co. v. *L. & N. Ry. Co.*, 65 Fed., 39.

Prescott, etc. Rly. Co. v. *A., T. & S. F. Ry. Co.*, 73 Fed., 438.

G. C. & S. F. Ry. Co. v. *Miami S. S. Co.*, 86 Fed., 407.

L. & N. Rly Co v *West Coast, etc Co.*, 198 U. S., 497, 498.

The court cannot make an arrangement or compel the making of contracts for the business intercourse of common carriers.

Pullman Car. Co. v. *Mo. Pac. Ry. Co.*, 115 U. S., 587.

Express Cases, 117 U. S., 1.

A., T. & S. F. Ry. Co. v. *D. & N. O. R. Co.*, 110 U. S., 682, 683.

In *Express Cases*, 117 U. S., on page 29, it is said:

"In this way, as it seems to us, 'the court has made an arrangement for the business intercourse of these companies, such as in its opinion, they ought to have made for themselves,' and that we said in *Atchison, Topeka and Santa Fe Railroad Co.* v. *Denver & New Orleans R. R. Co.*, 110 U. S., 673, followed at this term in *Pullman's Palace Car Co.* v. *Missouri Pacific Rly. Co.*, 115 U. S., 587, could not be done. The regulation of matters of this kind is legislative in its character, not judicial."

L. R. & M. Rld. Co. v. *St. L., I. M. & S. Rly. Co.*, 41 Fed., 559.

Southern Pacific Co v. *Colo. Fuel & Iron Co.*, 101 Fed., 779 and 786.

The commission has not the legislative power of prescribing any particular arrangements between connecting carriers. They cannot do, therefore, indirectly what it must be conceded they cannot do directly.

In *Little Rock, etc. R. Co.* v. *St. Louis, etc. Ry. Co.*, 63 Fed., 779, it is said:

"It is urged, however, in substance that although the court may be powerless to make and enforce agreements between carriers for through billing and through rating, and for the use of each other's cars, tracks and terminal facilities, yet that when a carrier of its own volition enters into an agreement of that nature with another connecting carrier the law commands it to extend 'equal facilities' to all other connecting carriers if the physical connection is made at or about the same place and the physical facilities for an interchange of traffic are the same, and that this latter duty the courts may and should enforce. *It will be observed that the proposition contended for, if sound, will enable the courts to do indirectly what it is conceded they cannot do directly.*"

After stating that the doctrine contended for would destroy the right of carriers to determine for themselves what contracts and traffic arrangements with connecting carriers are desirable and what are undesirable, the court says, on page 780:

"There ought to be a clear authority found in the statute for depriving the carrier of this important right before the authority is exercised, for when questions of that nature have to be solved, a great variety of complex considerations will present themselves, some of which can neither be foreseen nor stated."

Therefore, the Supreme Court in *Cin., N. O. & T. P. Ry. Co.* v. *Int. Com. Com.*, 162 U. S., on page 197, adopted and quoted with approval the view of the

late Justice Jackson in the case of *Int. Com. Com.* v. *B. & O. R. R. Co.*, 43 Fed., 37, as follows:

"Subject to the two leading prohibitions that their charges shall not be unjust and unreasonable, and that they shall not unjustly discriminate so as to give undue preference or advantage or subject to undue preference or disadvantage persons or traffic similarly circumstanced, the act to regulate commerce leaves common carriers as they were at common law, free to make special contracts looking to the increase of the business, to classify their traffic, to adjust and apportion their rates so as to meet the necessities of commerce, and generally to manage their important interests upon the same principles which are recognized as sound, and adopted in other trades and pursuits."

See, also,

Int. Com. Com. v. *Alabama Midland Ry. Co.*, 74 Fed., 723 and 724.

Int. Com. Com. v. *Western & A. R. Co.*, 93 Fed., 91.

Int. Com. Com. v. *Western & A. R. Co.*, 88 Fed., 196.

In *Nicholson, et al.* v. *Great Western Ry. Co.*, 7 C. B. (N. S.), 755; s. c., 1 Nev. & MacN. (Railway and Canal Traffic Cases), on page 149, Erle, C. J., said, with reference to the English statute:

"*I take the free power of making contracts to be essential for making commercial profit. Railway companies have that power as free as any merchants, subject only (as to this court) to the duty of acting impartially, without respect of persons;* and *this duty is performed when the offer of the contract is made to all who wish to adopt it.* Large contracts may be beyond the means of small capitalists; contracts for long distances may be beyond the needs of those whose traffic is confined to a home district; but the power of the railway company to contract is not restricted by these considerations."

To say that the carriers may not determine or prescribe the terms or conditions upon which their voluntary agreement for joint through rates shall become effective is simply to deny them the right to make an agreement upon the subject.

The routing provision in the joint tariffs is in express terms made the very condition or consideration upon whihc the initial carrier enters into the agreement fixing the joint rate. If that consideration or condition be held illegal, then, would not the entire agreement be invalid? The consideration for the joint rate is taken away. Neither court nor commission could enforce one part and reject the other or take away the consideration without making a new contract which the parties thereto do not want and would not make for themselves.

But being unable to point out any specific language, or clause in the Interstate Commerce Law which condemns the routing provision in question, the commission, in their anxiety to discover reasons, argue that the practice may result in an "unjust discrimination."

The commission state in their conclusions:

"It is not a sufficient excuse for the practice under discussion to say that the first carrier's control of the routing beyond its rails must be so exercised as not to unduly discriminate. The granting of a given routing to one and denial of the same to another is itself an *unjust discrimination.*"

This sentence demonstrates the little attention given by the commission to construing the language of the law which they are called upon to administer. It shows a lack of discrimination in reading that statute. What shall constitute an "*unjust discrimination*"

is very clearly defined in section 2 of that law. A case of "unjust discrimination" arises only under section 2, if a carrier—

"Shall directly or indirectly, by any special rate, rebate, drawback, or other device, charge, demand, collect, or receive from any person or persons, a greater or less compensation for any service rendered, or to be rendered, in the transportation of passengers or property * * * than it charges, demands, collects or receives from any other person or persons for doing for him or them a like and contemporaneous service in the transportation of a like kind of traffic under substantially similar circumstances and conditions, such common carrier shall be deemed guilty of *unjust discrimination*," etc.

The section only refers to discrimination in *charges* as between different shippers for like services in the transportation of a like kind of traffic *under substantially similar circumstances and conditions;* but all shippers who ship under substantially similar circumstances and conditions, that is all shippers who ship under and by virtue of the provisions of the joint tariff, are charged the same rate. In that event the carrier does the routing. Where shipments are made under other circumstances, as where the shipper insists on the privilege of routing, the locals applicable thereto are charged, the charges being the same in respect to all shipments under such conditions and circumstances.

No case of unjust discrimination has yet been presented either to the commission or to the court, and the commission cannot assume to decide such a case until it arises and is presented in due form. It cannot determine such a case until it is put in possession of the facts of such particular case and of the circumstances

and conditions attending the respective shipments in which it is claimed that an unjust discrimination was practiced in favor of one shipper as against another in respect to charges for transportation.

But the order in question is not even confined to meeting the fears of the commission or to cases which might come within the scope of such fears. Even if the granting of a given routing to one and denial of it to another in any given case might be held to constitute an unjust discrimination, it is obvious that the order of the commission is too broad to cover such a hypothetical case. If it were unlawful to do that in any case, would not the proper order, if any order could be made, be to prohibit the carrier from routing in any instance as requested by any shipper under such joint tariffs? How can it be assumed that the carrier will unjustifiably favor one shipper at the expense of another under similar circumstances?

The commission do not pretend to find anywhere that there existed a case of undue preference or unjust prejudice as between shippers by reason of anything done or omitted to be done by the carriers. The contention of the commission, however, in this respect, is not sound. The tariff provision in question is that the initial carrier shall in all case itself exercise the right to route.

If however, it be contended that the voluntary making of joint tariffs or through rates has the effect of creating continuous through lines or routes, then it would simply follow that the through lines or routes so made are the lines or routes of each and all of the carriers making the agreement. Therefore, if the initial

carrier by contract establishes joint through rates over several connecting lines, so as to apply to shipments between the same points the connecting lines are thereby made, for the purpose of the rates, the routes or lines of the initial carrier, and the case is then identical with that in which an initial carrier should itself operate two or more lines between the same points. In such case it would, undoubtedly, have the right to determine over what lines thus controlled by it the shipment should go. It might, of course, in a particular case, be held liable in case of damage if it selected a dangerous or unsafe route when a safe route was open at the time, but this would be upon the ground of negligence. That was the case of *Express Co.* v. *Kountze*, 8 Wall., 343, cited by the commission. In that case the express company employed two different routes in its business, the southern route at the time was the more expeditious, but it was dangerous. The northern route, while longer, was safer. The express company sent the gold dust in question over the dangerous route, where it was seized by rebels. As this danger was known to the express company, and such loss might have been anticipated, it was properly held liable for negligence.

III.

AT COMMON LAW THE QUESTION OF ROUTING WAS PURELY A MATTER OF ARRANGEMENT OR AGREEMENT, AND IT IS NOT AFFECTED IN ANY RESPECT BY THE INTERSTATE COMMERCE LAW.

At common law the question of routing was always regarded merely as a private arrangement between

shipper and carrier. If the carrier accepted the goods under specific directions from the shipper as to their delivery, the carrier impliedly in such case undertook to deliver according to directions. That was the ruling in *Streator* v. *Horlick*, 1 Bing., 34, the earliest case on the subject, in which it appeared that the carrier *assented to* the order of the shipper as given and was, therefore, held liable for failure to comply therewith.

In *Hastings* v. *Pepper*, 11 Pick., on p. 43, it was said by Chief Justice Shaw:

"As the carriage is *a matter of contract*, as the owner has a right to judge for himself what position is best adapted to carrying goods of this description with safety and to direct how they shall be carried, and as the carrier has the right to *fix his own rate for the carriage or refuse altogether to take the goods with such directions*, the court are all of opinion that if a carrier *accepts goods for carriage thus marked* he is bound to carry the goods in the manner and position required by the notice."

So much, indeed, is it regarded as a matter merely of contract that it is held where the bill of lading does not specify the route, the carrier has the right to select any route it deems proper, and oral evidence is inadmissible to show specific directions as to the routing given by the shipper. This demonstrates that it is purely a matter of private arrangement or agreement between the parties.

See,

Snow v. *I. B. & W. R. Co.*, 109 Ind., 422, 425; s. c., 9 N. E., 702, 703.

C. I. & L. R. Co. v. *Woodward*, 72 N. E., 558 (Supreme Court of Indiana, 1904).

White v. *Ashton*, 51 N. Y., 280, 284.

Hinckley v. *N. Y. C. & H. R. Co.*, 56 N. Y., 429, 433, 434.
Ind. R. R. v *Remy*, 13 Ind, 518.
Patten v. *U. P. R. R.*, 29 Fed., 591.
Post v. *Southern Ry. Co.* 52 S. W., 301; s. c., 103 Tenn., 220.

In *Lowe* v. *Seaboard Air Line Ry Co.* (S. C.), 41 S. E., 297, a statute of South Carolina restricting the rights of the carrier to ship or transport by the route which the carrier may choose and placing the control of the route wholly in the hands of the shipper, was held to be "an unlawful restriction on the freedom of interstate commerce," and to be invalid and void.

It was, therefore, held in view of the decisions under the Interstate Commerce Law, in *Post, et al.* v. *Southern Ry. Co.*, 103 Tenn., 220; s. c., 52 S. W., 301, that where goods are tendered for shipment to a point beyond the initial carrier's line and there are several routes equally safe and cheap, the carrier cannot be compelled to accept the goods to be carried over one route in preference to another at the shipper's option. That decision was not based, as supposed by the commission, upon the ground that through bills of lading rendered the initial carrier liable for loss or damage upon the connecting line, and for such reason it should have the right to select the route, but it was upon the ground that as the initial carrier was not obliged to carry beyond its own line, if it nevertheless undertook to go beyond said line it might impose as a condition for such undertaking the right to select the route for so doing. In other words, undertaking to do what it was not obliged to do under the law, such undertaking afforded a sufficient consideration to the ship-

per whereby the carrier was given the right to route, that being the condition upon which the carrier assumed an obligation which could not be imposed upon it under the law.

The same reasoning applies in respect to joint through rates. The initial carrier not being obliged under the law to make through rates, it may, for the same reason, impose upon the shipper this condition, as the carrier thus affords to the shipper a sufficient consideration for a waiver of the supposed right, if any, to route.

If, then, as is admitted, the initial carrier may refuse to enter into or make with connecting carriers by agreement joint through rates applicable to through shipments, certainly, if it chooses to do so, it may impose as the condition of its so doing, or for the offering of such joint rates to shippers, such a reasonable condition as the privilege of itself selecting the route (even if the shipper otherwise had the right), the shipper being protected in the through joint charge or rate. It only remains for the shipper to determine whether to accept the rate with the condition attached, or not. If he deems the condition too burdensome or the privilege of routing so valuable to him, he may exercise his claimed right by shipping under the local rates. He is not obliged to ship under the joint tariffs,

After all, the tariffs, whether joint or not, are simply offers of contracts on the part of the carrier to shippers to transport at the rates and on the conditions named, the joint tariffs of course involving the agreements between the carriers themselves fixing the joint

rates and the conditions applicable, which, of course, cannot be varied except by consent of the parties thereto. Chu v. Texas & Pac. Ry. Co. 194 U.S. 317

As the carrier is not obliged to carry beyond its own line, so it is not obliged to make rates beyond it. If, therefore, in the one case it may refuse to carry beyond its own line, except upon exercising the privilege of routing, it necessarily follows, also, that in the other case it may refuse to make a joint through rate good beyond its own line, except upon the condition also of exercising the same privilege of routing. The reasoning in each case must be identical.

Therefore, in *Galveston, H. & S. Ry. Co.* v. *Short,* 25 S. W., 142, it was held that a carrier may limit its liability to its own line in a contract for a through shipment to a point on another carrier's line and that while it thus makes a through shipment under a special contract for a reduced rate of freight, it is not liable for an injury to the shipment on a connecting line though it did not choose the through route which the shipper preferred. In the opinion it is said:

"The through shipment was made under a special agreement for a reduced rate of freight, and we are not prepared to hold that appellant, in consideration of this reduced rate, did not have the right to choose its connecting lines for the shipment. Appellee could have shipped to New Orleans, and there chosen his own route; but he was given a reduced through rate, and we cannot see that the liability of appellant is affected by the through route it chose. It doubtless chose the one with which it had arrangements for a through rate."

Indeed, the question whether the initial carrier may be held liable for the negligence of a connecting carrier will depend largely upon the facts concerning the

particular shipment and the rulings of the particular court in which the action may be brought. Some courts pay little heed to the limitations contained in the bills of lading, but are rather willing to deduce a contract for through shipment from the fact that the destination marked is upon a connecting line and a through rate is made by the initial carrier.

Thus, in *Railroad Company* v. *Pratt,* 22 Wal., 132, it is said:

"The jury were justified in inferring that where a carrier fixes a price for transportation over the whole route, that he makes the entire contract his own."

The commission was not justified, therefore, in assuming, because the usual forms of bills of lading issued by the initial carrier attempted to limit its liability to its own line, that therefore it could not or would not be held liable in any contingency for damage occurring upon some other line.

As it could not be asserted beyond peradventure that such liability might not attach it would evidently be unsafe to predicate a decision based upon the assumption that the initial carrier could not and would not under any circumstances be held liable in such a contingency.

In any event a refusal by the carrier to route as requested by a shipper is not a violation of any provision of the Interstate Commerce Law.

IV.

ANY INTERFERENCE WITH THE SUPPOSED RIGHT OF A SHIPPER TO DIVERT HIS SHIPMENT WHILE IN TRANSIT WOULD NOT BE IN VIOLATION OF THE INTERSTATE COMMERCE LAW. DIVERSION OF THIS TRAFFIC, AS PRACTICED BY THE SHIPPERS IS MERELY A PRIVILEGE OR CONCESSION GRANTED BY THE CARRIERS, BUT TO WHICH THE SHIPPER IS NOT ENTITLED AS A MATTER OF RIGHT.

Much space is devoted in the report of the commission to a consideration of the supposed right of the shippers of this traffic to divert it to a new destination while in transit from the original point of shipment. Among other things, it is said by the commission:

"Another deprivation of right generally supposed to be vested in the shipper is found in these cases in the inability of the shipper to divert his freight in *transitu* to a point where the market conditions become favorable after transportation of the shipment commences."

It is difficult to understand why such a subject should be brought into the report or considered by the commission, since the commission nowhere point out in the statute a right in shippers to divert freight while in transit and to require transportation under the original through rate to a new point of destination. The commission, as shown by the dissenting opinion of Commissioner Knapp, was also in error in respect to this supposed right.

It may be true that at common law the shipper, if also the consignee or the owner of the freight, may, upon surrender of the bill of lading, which is an *indicium* of title, and upon indemnifying the carrier against

possible liability, demand a surrender of his freight at any point upon paying, however, to the carrier the full charge or rate to the original destination designated in such bill of lading. When carriers receive freight marked for delivery at a given destination a contract for transportation is then made which cannot be broken by either party, except upon paying damages to the other for the breach; and in case the shipper prevents the carriers from completing the contract by demanding delivery at an intermediate point, the damage resulting to the carriers in being prevented from fully performing are the full charges for transportation which the shipper is obliged to pay before he is entitled to the custody of his goods.

Ellis v. *Willard,* 9 N. Y., 529.
Violett v. *Stettinius,* 5 Cranch. (C. C.), 559, or 28 Fed. Cas., No. 16,953.
Braithwaite v. *Power,* 48 N. W., 354.
Hutchinson on Carriers (2nd Ed.), Sec. 444-a.

The shipper evidently has no right to demand that the freight be diverted while in transit and be transported to a new destination without paying the original freight charges and making a new contract for transportation from the point of diversion to the changed destination. Yet, in regard to this traffic, the carriers permit, as a matter of grace, the shippers thereof to divert the same and send it to a new destination without any other charge than the original freight rate.

In *Pinnix* v. *The C. & S. R. R. Co.,* 66 N. C., 34, on page 41, it is said:

"A shipper has no right to have the goods delivered to him at an intermediate station where the bulk is not broken, except by the assent of the company; even

should he offer to pay the freight through to the point of destination; for it is not in the contract. We are inclined to think, however, that at a station like Charlotte, where the bulk is broken, that is, where the goods are unloaded and transferred to another car or to the warehouse, the shipper may, upon tendering the full freight, and indemnity against the consignee, require that the goods be delivered to him there, and not be carried further, on the principle that having the goods carried is for his benefit alone, and he may dispense with a part of that stipulation in the contract, the freight being all that concerns the company."

The practice of diversion by shippers of this citrus fruit traffic as enjoyed by them is, however, as stated, purely a matter of privilege or concession granted by the carriers and is not a matter of right residing in the shipper. The privilege of diversion is still granted by the carriers. The privilege is only claimed to be of importance to the shipper where a carload goes forward without any genuine or real destination. With such carloads the shipper is desirous of being able to test and reach several different markets. In such cases the shippers give a fictitious and not a real destination. Such cars are called by them "Tramp Cars," as shippers do not know at the time of shipment where they may desire final delivery to be made. The carriers hold these cars for the shippers at different points, sending them from one place to another, and in the end charging only the rate which would obtain between the initial point and the point of final delivery. No charge is made for freight which might have been earned under the different contracts for transportation arising from the different diversions made. The diversions are accomplished by the initial carriers at great expense to themselves, and

practically none to the shippers. By reason of these diversions the earnings or divisions of the through rate which the initial carriers receive are necessarily greatly reduced, as the joint through rate is divided with the other lines. These are all concessions to, not rights of, the shippers. What legal right has a shipper to make the cars of the carrier "tramp cars?" Indeed, he has no right of control over the cars. He has no right to demand that the car furnished by the initial line shall go beyond that line. Certainly the shippers would not care to insist upon the right of stoppage to which they may be entitled if the carriers also insisted upon their legal demands arising out of these diversions.

But, after all, what provision of the Interstate Commerce Law was shown to have been violated?

V.

REASONS WHY THE INITIAL CARRIERS SHOULD HAVE THE RIGHT TO ROUTE UNDER JOINT TARIFFS OR JOINT THROUGH RATES

Many reasons might be given why the initial carriers should have this right as the consideration for making or offering joint through rates, which are lower than the locals. Under all the circumstances, as disclosed by the evidence in this case, the routing provision is reasonable and fair. Many of the reasons are set forth in the opinion of the court in the case of *Post et al.* v. *Southern Railway Company*, 103 Tenn., 220; s. c., 52 S. W., 301.

The arrangement giving the initial carrier the right

to route as a condition of making joint rates lower than the sum of the locals is not detrimental to shippers, for by this means joint rates to all places are made possible. The initial carrier could well refuse to make joint rates with but a few connecting carriers and shut out all others from the business, and facilities for distribution over a large territory would thus be lessened. By making this joint rate with all connecting carriers the shipper is guaranteed a low joint rate no matter where he may desire his shipment to go. The routing by the initial carrier facilitates distribution.

These initial carriers furnish to the shippers for through transportation the refrigerator cars, being a character of equipment not owned or controlled by the connecting lines. The connecting lines do not furnish such equipment for this traffic. They have not such equipment of their own. The initial carrier is not obliged at all to permit its equipment to go beyond its own line, and it might compel the shipper to accept delivery at the end of its road and secure cars from the connecting lines in which to load and transport further. The initial carrier is, therefore, vitally interested in seeing that this equipment which is furnished by it, and which is so necessary in this business, should be expeditiously returned to it by the connecting lines. It should, accordingly, be in a position to determine what connecting lines will give efficient service and quick return to its equipment. As this equipment is limited in respect to the kind of traffic which can be loaded and carried therein, the initial lines are generally obliged to haul these cars empty westward in order to be reloaded. It is im-

portant, therefore, that they should be in a position to determine what connecting lines will secure freight for these cars for the westward haul. It should also be in a position to determine what lines will at the time, and from time to time, be able to return such cars without any unnecessary delay. It is to the interest of the public, as well as of the carriers, that the initial carrier should not be obliged to haul more empty cars than necessary. The initial carrier at all times is in a better position than the shipper to ascertain and determine what connecting line can at the time give expeditious service, and what lines, by reason of temporary congestion, cannot. Its interest in having expeditious service and quick return of the cars is greater than that of the shipper.

Again, as it is frequently difficult to determine where damage to this character of freight may have occurred (in other words, where the damage is what is known as "concealed loss"), the initial carriers are always called upon to settle and adjust claims for such damages. As a matter of policy, and in order to keep on good terms with the shippers, the initial carriers are required to use their utmost efforts to adjust these claims. They are frequently required to participate with other companies in the settlement thereof. It is important, therefore, that they should be in a position to demand of connecting carriers early and prompt adjustments of meritorious claims. This cannot be done if they cannot exercise some control over connecting lines with respect to the routing of shipments or the exchange of business.

VI.

ON THE ALLEGED POOLING OF CITRUS FRUIT TRAFFIC BETWEEN THE CONNECTING CARRIERS.

The decision of the lower court is based solely upon the proposition that the arrangement upon which the joint tariff rates were based, and which give the initial carrier the right to specify the route over connecting lines, gives such initial carrier the right to divide that business between lines which are competitive, where the shipment might pass over one of any two or more connecting lines which might also be competitive and over which it might be routed to reach destination.

The court quotes at large from the testimony of the traffic officials of the intial carrier to show that they insisted, as a condition of making a joint rate with each connecting carrier, that the initial carrier should have the privilege of selecting the ultimate route, and that this was done for the purpose of putting an end to the abuses which had theretofore existed of connecting carriers secretly cutting the joint rate, to the detriment of the initial carriers, and the court seemed to think that this put an end to competition between connecting carriers and that this was in violation of section 5 of the Interstate Commerce Law.

The court seemed to forget that the evidence clearly showed that the initial carrier determined *for itself* what amount of freight should be routed over each connecting line, and the connecting carriers did not know what proportion they would get or were getting,

so that there was no arrangement or agreement between connecting carriers which were competitive, as to any alleged division of this traffic.

The proof showed that the initial carriers insisted on the routing provision for their own protection and the connecting lines were forced to acquiesce in this provision if they wished to participate with the initial line in the joint rate. Therefore the assumption or conclusion that an agreement for this provision was made between or at the instance of the connecting lines, which were competitors, was not only far fetched, but unnatural and contrary to the evidence. If it had been shown (which, however, was not) that there was a collateral agreement between any competing connecting carriers to divide between themselves this traffic should not that specific agreement alone be enjoined. That, however, would not justify an order forbidding the initial carriers from ever exercising the right to route even under subsequent arrangements for subsequent joint tariffs.

Some confusion of thought no doubt arises from the fact that the joint rates agreed upon between the initial carrier and each of the connecting carriers is embodied in a single tariff or document. This tariff or document is a memorandum or evidence of a vast number of agreements between the initial carrier and the connecting lines. The joint tariff is filed by the initial carrier and published at stations on its line at which freight is received which is expected to be moved over its lines under the joint rate to points beyond. It evidences the offer of the initial line to the shipping public at the points of origin of

a guaranty by such initial line of rates to final destination on connecting lines, at places mentioned in the tariff, the tariff simply designating the places between which the rates apply, and the carriers which have acquiesced in those rates. Now, if the initial carrier were required to make a separate tariff sheet for each possible through line over which it proposed to make the joint rates applicable, it will be readily seen that as there are nearly two hundred carriers designated in this tariff, that there might be a possible combination of a thousand or more lines made, and instead of publishing a general and single tariff showing rates between places, the carrier would have to publish a thousand or more different tariffs. That would not only be confusing to the public but unjustifiably expensive and onerous upon the initial carrier.

The commission itself was of course aware of this method of preparing and publishing joint tariffs and had prescribed no different method, but had acquiesced in the said method because it evidently understood that it would be impracticable to do otherwise, and any different course would be of no benefit to shippers. Tariff rates at best are quite complicated, and no good reason exists for making them more so.

But the initial line was justified in insisting that competition of other lines with itself should be controlled within legitimate bounds or by legitimate methods. It must be remembered that the Santa Fe lines extended from Southern California to Chicago; that upon this traffic there was a flat rate of $1.25 per hundred pounds from Southern California points to all points on and east of the Missouri river. The

connecting lines tapped the Santa Fe at various points west of Chicago and diverted traffic from it at such points. Where this traffic was diverted at such points the Santa Fe line was called upon to divide this flat rate with such other lines, if that joint rate was to be maintained. It would thus loose the long haul over its own line to which it was legitimately entitled.

By refusing to make a joint rate with other lines it could keep the traffic upon its own line to its terminus. To encourage the distribution of this traffic, however, it sacrificed the charges which it might insist upon, and by making a joint rate agreed to accept only a proportion of the flat rate, permitting connecting carriers to participate in a joint rate which was no greater than the rate to its own terminus. The shippers of this traffic in Southern California were therefore benefited by the arrangements made by the initial carrier with every other connecting carrier in the United States for a through joint rate of $1.25 per hundred pounds.

It is quite evident that the connecting lines were in no position to compete openly with the initial line, for they could not possibly by any arrangement make a lower rate than that which the initial line was willing to make as a joint rate for the whole distance. It is difficult to understand, therefore, how the shippers could claim they would be benefited by any open competition of connecting lines.

Neither the joint tariff nor any arrangement testified to, forbids any connecting carrier from at any moment withdrawing its consent to the joint rate and

making any rate it pleases over its own lines or competing to its heart's content with any other line.

If the joint tariff should be held invalid because some of the parties thereto happen to operate some lines which are in some respects and in some territories competitive, then the joint rate is also invalid. On the contrary, the joint tariff to be sustained in the interest of the shippers must be held merely to be a mere memorandum or a concise statement of a vast number of agreements between the initial carrier and each company operating a connecting line, either directly or indicertly, by other lines with the lines of the initial carrier.

While some stress is laid in the opinion of the court upon an expression of Paul Morton, in his testimony, that one of the objects was to maintain the published tariff rates, it clearly appeared from the other parts of his testimony that by this expression he meant that he wished to suppress the illegal practices of secretly cutting published tariff rates, while the same were in force. When he referred to maintaining the tariff rates he meant maintaining their lawful integrity by adhering to them while in force. That, he distinctly stated in his testimony. All of his testimony means nothing else than this.

Was there anything illegal in this?

The lower court based its opinion almost entirely upon some expressions found in the majority opinion of this court in the Trans-Missouri case, 166 U. S., 314, 315, which case arose under the Sherman Anti-Trust Act. In that case, however, it was shown that the fifth section of the Interstate Commerce Act had

nothing to do with that case one way or the other and in that section there was no express provision prohibiting the maintenance of traffic rates among competing roads by making such an agreement as the one involved. As the Interstate Commerce Commission is given no power to administer the Sherman Anti-Trust Act (*Spriggs* v. *B., etc., R. R.*, 8 I. C. Rep., 442), it is hardly necessary to discuss in this case, either that law, or the Trans-Missouri case. When an appropriate case is brought under that law it will be time enough to consider it. It may be sufficient to say to the argument put forward by the lower court, of the necessity of requiring competition between carriers no matter what its nature may be, that it is stated in the recent English work of Boyle & Waghorn, On the Law Relating to Railway and Canal Traffic, on page 155. Vol. 1:

"The system of reckless competition and ruinous reductions of competitive rates, which had created so much injury on the American continent, was developing in England, but was checked and kept within not unreasonable bounds by the operation of the Traffic Act of 1854."

The lower court seemed to have forgotten that the Interstate Commerce Law by its various provisions, does discountenance and in effect prohibit certain kinds of competition between common carriers which had theretofore existed,—that sort of competition which might appropriately be designated as "unfair," namely, by the secret cutting in favor of large or favored shippers of tariff rates which were ostensibly open to the public. In the fierce competition for the business of large shippers carriers did not hesitate

to deceive each other and the public by keeping open one rate for the public and secretly cutting it when in competition with another carrier for the business of such large shippers. In order to prevent that unhealthy competition section six was passed, which requires the common carrier to adhere to or maintain the published rate while in force, and forbids him to either raise or *lower* it except upon a certain number of days' notice.

Section two forbids him to unjustly discriminate in favor of one shipper as against another in respect to rates where the service and conditions are similar, yet such discriminations were rarely indulged in except through competition of the carriers themselves for such business. Section six was simply intended to reinforce section two.

Assuredly it is not a reasonable construction to be put upon the pooling clause (section five of the Interstate Commerce Law), to say it was intended to encourage any kind of competition and to prohibit any sort of restrictions thereon, since other provisions of the law did manifestly restrict the carriers in their competition with each other.

There was no such issue, however, or charge of anything illegal in this respect made in the complaints filed before the commission nor did the findings of fact of the commission justify any such charge or conclusion.

The complaints were merely directed against the use by the railway companies of refrigerator cars belonging to private car lines, some of which were controlled by fruit shippers, notably Mr. Earl. (Tran-

script, p. 16, paragraph 10.) Also that the Southern Pacific Company and the Southern California Railway Company had entered into a contract or agreement to pool and divide between them "the aggregate or net proceeds of the *earnings of all business* done by any of said defendants originating in southern California." (Transcript, p. 17; paragraph 12.)

The commission, however expressly stated it did not find under the evidence then submitted such a pool, but found that the arrangement with the private car lines was not illegal. (Tr., p. 77.) The commission stated in conclusion (Tr., p. 77), "the evidence is unsatisfactory as a basis for definite conclusions upon the following questions: Whether the defendant carriers pool their citrus fruit traffic or divide the earnings therefrom," etc.

In paragraph 14 of the complaint (pp. 17 and 18, transcript) it is simply charged that initial carriers reserved the right of routing for the purpose of making effective the agreements with the private car lines and the aforesaid pooling contract between the Southern Pacific Company and the Santa Fe Company, for a division of the earnings on this traffic; that the arbitrary routing of the carriers gave a preference to the private car lines.

In conclusion it was then stated, on belief, "that by reason of the aforesaid pooling arrangement" (between the Southern Pacific Company and the Santa Fe Company) "the several lines of railroad connecting with said defendant's line of railroad, are promised and guaranteed by the initial line their proportion of the business or a division of the business and

that consequently all competition for the carriage of said products is destroyed and the connecting carriers are not obliged to secure and hold the business by reason of good service."

This was far from alleging that there was any combination or agreement among competing connecting carriers even to divide the traffic.

It indisputably appeared from the evidence before the commission, and in fact was found, that prior to the adoption of the routing provision in the joint tariffs large shippers of this traffic, including especially the two complainants, had arranged with the private car lines to sell the routing in consideration of unlawful rebates received from such connecting lines as would pay the most, and such rebates were received by such complainants, and the business was routed by the private car lines alone. To put a stop to this illegal practice the initial carriers insisted, as a condition of making any joint rate with such connecting carriers that the initial carrier should thereafter route the shipment so that connecting carriers would have no incentive to make unlawful bids for the business, and when the routing rule was enforced, on January 1, 1900, the payment of these unlawful rebates ceased.

Among its conclusions, contained in its report the commission state (Rec., 74):

"The chief reason assigned by the defendants appears to be that it diminishes opportunity for successful arrangement between the shippers on the one hand and carriers and refrigerator car companies on the other for rebates. *It does appear that after the control of all routing was taken over by the defendants and away from the shippers, the practice of paying rebates practically ceased.*"

But the commission then state as a further conclusion:

"It further appears that a tonnage pool of this traffic as between the connecting carriers *not defendants* was established and that the defendants so controlled the routing as to give specific percentages of this traffic to their several connections, thereby fulfilling and giving effect to this unlawful and forbidden arrangement."

The commission continues its conclusion on this point as follows:

"Reason is found in the facts shown for the *belief* that the suppression of the practice of allowing rebates was only an *incidental result* of and was not the primary or principal *object* of the *defendant carriers*, in taking over to themselves control of the routing beyond their respective roads, but that the object was to give effect to the tonnage divisions before stated, between their connections. The testimony shows that the rebates had not been paid or borne by the defendants, but largely by the owners of the refrigerator cars in which the fruit was shipped and in part by eastern connections."

Referring to the facts stated in the report to see upon what these conclusions are based we will see how illogical and flimsy this conclusion is.

The routing provision in the joint tariff then in force is set out in transcript page 59. It is in effect the same as the routing provision found in the joint tariff now in force, and which was effective July 20, 1903 (Rec., 358), as follows:

"The joint tariffs and rates herein named are made and entered into upon the express condition that the initial carrier shall have and exercise the sole and exclusive right of routing all shipments under said joint rates beyond its terminus as well as upon the other

conditions, provisions and stipulations, hereinafter set forth."

The provision originally adopted and referred to in the decree of the lower court was changed long before the hearing so as to read as above.

The commission then found (transcript, p. 60) that on January 20, 1900, the defendant, the Southern California Railway Company, issued a *private* circular to *its own agents* containing instructions how shipments of citrus fruits should be routed, to the effect that in forwarding shipments they should be divided between connecting lines in accordance with the proportions shown on this sheet.

On page 61 of the transcript, the commission find that the part of the circular showing these percentages was not furnished at the hearing, and then state further:

"*Whether this circular has been cancelled or superseded by another does not appear.*"

Owing to the indefinite and loose way in which testimony is generally taken before the commission the issues being lost sight of, it is not strange that some further explanation was not then made in respect to this private circular, for if it had been deemed at all important or relevant an explanation would then have been furnished.

Section 15 of that law, moreover, provided that the alleged violations should appear "*by the testimony of witnesses or other evidence.*" No authority was given the commission to make findings without evidence.

It appeared, however, in the testimony in the lower court beyond question, that this circular was merely

for the private information of the agents of that initial line alone, and that connecting carriers had no access to the same, but that it was kept from them so that they did not know what proportion of this business any of them was to receive. The testimony further clearly showed that these percentages fixed by the initial carrier were changed by it from time to time, and were fixed without reference to any alleged agreement or understanding between the connecting carriers, and without consulting them.

The commission further find (transcript, p. 62):

"The testimony is that while the initial carriers do not always route as requested by the shippers, *they generally do comply with such requests.*"

As shown in the dissenting opinion of Mr. Commissioner Knapp, that finding also shows the absurdity of the conclusion of the commission.

The commission further find (transcript, p. 62):

"The defendants claim that the rule reserving to the initial carrier the right to route the traffic was necessary to enable them to secure a discontinuance of a practice of paying rebates which prevailed previous to the establishment of the rule and which is referred to in another part of these findings. Just how the the rule actually operates to prevent rebate payments by connecting lines or others is not disclosed. The situation warrants the inference, however, that these two initial carriers or systems, connecting with other carriers at various points, and they in turn connecting with numerous other carriers, as shown by the tariff are able by acting in concert, and routing as they see fit, to only send traffic over the roads of such carriers as fulfilled an agreement to refrain from making any rate concession to the shippers, and such influence of like character could doubtless be exerted by them upon the car lines which are also hereinafter referred to."

It was fully disclosed in the testimony taken by the commission itself and it appeared in the very evidence introduced by the complainants themselves before the commission, how the rule operated to prevent rebate payment by connecting lines and that such rule was adopted for that and no other purpose. Connecting lines were notified that if any of them did give rebates from the published joint tariff while in force the initial line would cancel the joint tariff as to such connecting carrier. The moment it was understood that the initial carrier and not the private car lines, would route, then all incentive on the part of the connecting carrier to bid by way of rebate to the shipper, either directly or through the car lines, for the routing was necessarily taken away.

In the letter dated January 15, 1900 (Rec., 820, 821, 822) President Ripley of the Atchison Company stated to Charles E. Maud, President of the Consolidated Forwarding Company, one of the complainants before the commission, and introduced by said complainants as their evidence, as follows, referring to the car line companies and their practices:

"*It is an open secret that these lines were in the habit of soliciting from our eastern connections a money consideration in return for their alleged influence upon the routing of business, and when such considerations were obtained it was the custom of those lines to divide the amount to a greater or less extent with the shippers of the fruit.* In some cases the owners of the car lines were also shippers of fruit, in which case whatever concessions they might be able to obtain from our eastern connections resulted to their advantage. The situation was choatic and resulted, as I believe, in a detriment to all concerned. It was certainly burdensome to the railroad companies, the

tendency being to crowd into California more cars than could be used, as well as to compel us to use certain classes of cars to which there were serious objections."

Further on he stated in the same letter:

"We were determined to break up the practice which we believed they had indulged in of selling the business handled in those cars to our eastern connections, *and this we could only do by taking the routing into our own hands, and notifying all such connections that any contracts or concessions made with or to the owners of these cars would be valueless, since we should pay no attention to routings.* It seemed to me, and still seems, that this deprives the car owners of any advantage over the shippers."

He stated, further on:

"You ask why we select the citrus industry alone in exercising our right to route freight for which we accept the responsibllity for through rates. The answer is that the right is one which we do not care to exercise except for our own protection and for the general good morals on the part of both carriers and shippers; and should circumstances arise which should inject into other business the same conditions that have heretofore existed as to the citrus business we should unquestionably desire to exercise our rights as to such other busines. At the present time there seems to be no necessity for so doing."

The commission could hardly have been oblivious to this evidence, and the other evidence, if its decision was to be based upon evidence.

On page 65 and 66 of the transcript the commission find:

"For seven or eight years prior to 1900 *the shippers of citrus fruits from Southern California to competitive points in the east received rebates ranging from* $15 *to* $25 *per car, which were paid in a great many cases by the car line companies.* * * * *The eastern*

connections of the defendants also paid these rebates or a part of them through their representatives direct to the shippers. These eastern connections were also shown in some cases to have paid the car line companies more than the actual car mileage charges, in order, as Mr. Earl of the Continental Company testified, *to help out the car lines in paying the rebates.* * * * Rebates were paid when the car was not refrigerated as well as when it was, though they were greater when refrigeration was used. The average rebate was $15 when not refrigerated, and $25 when refrigerated. *It appears that the eastern connections of the defendants were willing to pay these rebates, or their share of them, in order to have the traffic routed over their lines.* Mr. Naftzger, president of the Southern California Fruit Exchange, filed a statement showing rebates received *by that complainant* during the four years, 1895, 1896, 1898 and 1899. The rebates for 1895 and 1896 were from the Overland Despatch. The reason why 1897 is omitted is because he claims to have had no data for that year. These rebates aggregate for those four years $37,165 from shipments under refrigeration, and $137,326, from shipments not refrigerated, making a total of $174,-491. As the practice of paying these rebates was general, the shippers came to regard them as part of their legitimate returns from the orange business. *The payment of these rebates was discontinued January* 1, 1900, *and there is no evidence that the practice has been resumed.*"

Not only did the large shippers come to regard these illegal rebates as a part of their legitimate profits, but the commission itself winked at the matter and treated it as proper. Instead of performing its duty under section twelve of that law by seeing that these shippers were prosecuted for violating section ten of the law, and placing the matter before the proper District Attorney of the United States for that purpose the commission on the contrary gave to the complainants

who were found guilty of violating this law an order and a remedy which would enable them to again indulge in their illegal practices.

How can it be expected this law will be respected if shippers who clamor for and receive these unlawful rebates shall not only go unpunished but shall on the contrary be regarded by the body specially created to enforce this law as receiving but what they are justly entitled to? Is the man who demands a bribe better than the one who is forced to yield?

On page 68 of Record the commission further stated as a fact:

"The routing circular of January 20, 1900, extracts from which appear herein in connection with the finding as to the rule of the carriers reserving to themselves the routing, shows that the orange shipments are forwarded by the initial carrier so as to give certain percentages of the traffic to connecting lines."

We therefore see from this extract from the report of the commission that its conclusion in question was based altogether upon the showing of a private routing circular of the Southern California Railway Company of January 20, 1900, to its own agents (which the commission did not know as they state was then in force or not), and to the finding in respect to the existence of a rule in the joint tariff reserving to the initial carrier the right to route. This, however, did not justify the assumption or conclusion that the routing provision was adopted to give effect to any supposed or suspected agreement or understanding between competing connecting carriers that this business should be divided between them upon any understood or agreed basis. The conclusion, therefore, appeared to be wholly unsupported by the findings.

The evidence before the lower court in any event, fully explained the routing circular of January 20, 1900, and showed that connecting carriers were not aware of its existence or of the percentages therein contained. On the contrary, the initial carrier varied from these percentages fixed by itself, from time to time as it pleased.

But as the commission found that the initial carriers generally comply with the request of the shippers as to routing, then, as stated in the dissenting opinion of Commissioner Knapp, it is difficult to understand how the initial carriers could be regarded as giving effect to any supposed arrangement between connecting lines for a tonnage division. Moreover, what interest or concern could the initial carrier have had in entering into and carrying out an alleged agreement between connecting lines for a division of the traffic over such other lines? How could such an arrangement profit the initial line?

The conclusion of the commission upon the face of its own report is indeed remarkable, yet after all, could it be expected that a fair, candid and unprejudiced finding or decision would be made in favor of the carriers by a tribunal invested with inquisitorial powers, and which generally assumes the attitude of prosecutor against the carriers? It is not in human nature that a prosecutor can at the same time be an impartial judge of the conduct or rights of those to whom he stands in the attitude of prosecuting.

In any event, had the conclusion of the commission been well founded, the only order, if any, which would have been appropriate in the premises would be one

which would inhibit the carrying out of a specific, unlawful agreement or combination, if any, found to exist. The right to route cannot be forever condemned upon any such ground or for that reason. Yet the order of the commission is not confined to any particular agreement nor to any particular joint tariff. It operates forever, as long as the commission shall be pleased to allow its order to stand to forbid the initial carrier from routing over connecting lines, while at the same time compelling the carrier to give to the shipper the joint rate which is made by the initial carrier as a consideration for the privilege of itself routing.

VII.

EVEN THE CONCLUSION OF THE COMMISSION DID NOT SHOW A VIOLATION OF THE POOLING CLAUSE. THAT CLAUSE CONSTRUED.

The conclusion of the commission, however, was merely to the effect that there was some arrangement or agreement between connecting lines *not defendant's* for a tonnage division of this traffic. It may be inferentially assumed that some of these connecting lines were competitive in some respects or in certain territories, though this is not stated in the findings in the report. As nearly two hundred carriers were embraced in these tariffs, and their various lines by connections reached all parts of the United States, many of them would not be competitive at all. Nevertheless, even such an arrangement, if it had existed, would not have been a violation of the pooling clause, even by

such connecting carriers, if competitors. Section 5 of the Interstate Commerce Law reads:

"That *it shall be unlawful* for any common carrier subject to the provisions of this act, *to enter into any contract*, agreement or combination with any other common carrier or carriers, *for the pooling of freights of different and competing railroads*, or *to divide between them the aggregate or net proceeds of the earnings of such railroads*, or any portion thereof; and in any case of an agreement for the pooling of freights as aforesaid, each day of its continuance shall be deemed a separate offense."

In any event this only renders unlawful, for the purposes prohibited, contracts between competing carriers.

It is made unlawful for common carriers, if competing railroad companies,

First. To enter into any contract, etc., for the pooling of their freights;

Second. To divide between them the aggregate or net proceeds of the earnings of such railroads.

The first thing prohibited is "*to enter into an agreement*" or combination for pooling. The next thing prohibited is the act of making a division of the aggregate or net proceeds of the earnings of such competing railroads. As ordinarily the entering into of an agreement and acting under it would constitute but a single offense, it was, therefore, deemed advisable to alter such rule by providing, as in the concluding sentence, that in the case of "*an agreement for the pooling of freights,*" each day of its continuance should be deemed a separate offense. No such provision, of course, was necessary to the second case provided, namely, the mere division of the aggregate or net pro-

ceeds, as such division would constitute but a single act and therefore, in any event, but a single offense.

If Congress intended that the words in the first part of the section "to enter into any contract," &c., was to reach to and qualify the latter part, "to divide the earnings," as claimed by the lower court, it would be difficult to understand the meaning of the concluding sentence, and why each day of an agreement for pooling of freights should be made a separate offense, and why a similar provision should not be made in case of an agreement to divide the earnings if it was intended that the words "contract, agreement", etc., in the first part of the section applied as well to qualify the latter part referring to a division of the earnings.

It was contended by the lower court that Congress intended to prohibit a carrier from entering into any contract for the pooling of freights, or to enter into any contract to divide earnings, in order to show that the word "freights" had a different meaning from the word "earnings." That, however, would leave an absurd result to follow from the last provision of this section.

The lower court seemed to think that any other construction than that adopted by it would be ungrammatical. But that is not very important. Other parts are ungrammatical. The main object is to ascertain what Congress intended.

What then did Congress intend by the word "freights" in the clause "any agreement for the pooling of freights"?

The section in question is not only highly penal and must therefore be strictly construed, but the word

"freights" is used in this clause in connection or association with the word "earnings" and should, therefore, be given a kindred meaning if possible.

Schenley's Appeal, 70 Pa. St., 101 and 102.
Hadley v. *Perks*, L. R., 1 Q. B., 455, *et seq.*
Lewis' Sutherland on Statutory Construction, Secs. 414, 415 and 416.
Holman's Appeal, 106 Pa. St., 502-507.
Newport News Company v. *U. S.*, 9 C. C. A., 579; s. c., 61 Fed., 488.

The word "freights" in this clause means, not the commodity or traffic carried, but the receipts or compensation for the carriage thereof. It cannot, evidently, be given both meanings. If it meant only the commodities carried, it would not include passenger business. If, on the other hand, it was intended to mean the receipts, it would also include compensation derived from passenger carriage.

The lower court seemed to think there could be no division of passenger business because the passenger would determine for himself the route he wished to take. The Interstate Commerce Commission, not long ago, however, found that there was just such an arrangement to divide between the various railroads the immigrant passenger business from New York, and it is almost as easy to divide up the passenger carriage, where there is a large movement of the same, in one direction, as there would be of the freight.

In 3 Kent's Commentaries (12th ed.), p. 219, that eminent writer says:

"*Freight*, in the *common acceptance of the term*, means the *price* for the actual transportation of goods

by sea from one place to another, but in its more extensive sense, it is applied to all *rewards or compensation paid* for the use of ships, including the transportation of passengers."

In *The Main* v. *Williams*, 152 U. S., 129, Mr. Justice Brown said:

"By the law maritime the word "*freight*" is used to denote *not the thing carried*, but the *compensation* for the carriage of it."

He then quotes from a former opinion as follows:

"In Saxon, from which much of the English language is derived, it is called *fracht*, whether it be a *compensation* for transportation in ships by sea or carriage by land, either of goods or persons, in gross or detail."

To the same effect see,

Vol. 4, Words & Phrases Judicially Defined, pp. 2973 to 2976.

Giles v. *The Cynthia*, 1 Pet. Adm., 203, Case No. 5424, Vol. 10, Fed. Cas., pp. 369, 370.

Poland v. *The Spartan*, 1 Ware, 130, Case No. 11246, Vol. 19, Fed. Cas., 912, 914.

In the case of *Lord* v. *Neptune Ins. Co.*, 10 Gray's Reports, 112 and 113, Chief Justice Shaw, said:

"The term "*freight*" has several different meanings; as the *price to* be paid for the carriage of goods; or for the hire of a vessel under a charter party or otherwise; and sometimes to designate goods carried, as a "freight of lime" or the like. But as a subject of insurance it is used in one of the two former senses, and in this policy it means plainly the aggregate of the prices to be received at agreed rates, for the carriage of several parcels of specific goods as expressed in several bills of lading."

"To pay the freight," is a common and usual ex-

pression. In its ordinary meaning the word covers compensation or pay for the carriage, or the earnings of a carrier. In another sense, it is true, the word might, if the context plainly so indicated, be intended to designate goods or commodities carried. Thus, in the sixth section, the phrase is "in every depot * * * of such carrier where *passengers* or *freight*, respectively, are received *for transportation.*" There, the word "freight," in connection with the words "are received for transportation," plainly means the commodity carried. But in that sense it would not include passengers, and the result would then follow that an agreement for pooling the commodities carried, if "freight" were so used, would be prohibited, while an agreement for pooling passenger traffic would not be. Again the word "freight," when intended to mean the traffic or commodities carried, is generally comprehensive in its scope, and the singular instead of the plural—"freights"—should be properly used in that connection.

But "pooling" used as referring merely to an agreement for a division of the traffic to be carried by the respective companies, would indeed be an awkward and inappropriate word to use.

The meaning of a word is usually determined by the context. The maxim *noscitur a sociis* and the rule of *ejusdem generis* are usually applied in the interpretation of contracts and statutes to determine in what sense a particular word may be used. The mind usually groups similar ideas together. The word "freights" in Section 5, used in connection or association with the word "earnings," as well as from the fact that in pooling contracts at the time of the pass-

age of this law the usual provision was to pool the receipts or earnings, it is evident, was intended to cover the receipts, that is, the pay or compensation received from any kind of traffic on competing railroads.

A railroad pool, so-called, had a well understood meaning at the time of the passage of this law. Pooling contracts or arrangements between competing roads were well known in England, from whence they were borrowed, but such contracts had reference only to earnings.

In 1 Wood on Railroads (Minor's edition), Sec. 207, which at the time of the passage of this law was a recognized authority, it is said:

"In England it is held that pooling contracts or arrangements between competing roads by which they agree to divide their *joint earnings* upon certain classes of business, or even their entire earnings, are legal and valid, where it does not appear that the interests of the shareholders or of the public are prejudiced thereby."

See, also, Sec. 207a.

In *U. S.* v. *Trans. Mo. Ft. Assn.*, 58 Fed., on p. 65, Judge Sanborn, said:

"Contracts between competing corporations, commonly termed 'pooling contracts' to divide their *earnings* from the transportation of freight *in fixed proportions*, have long been held void by the courts as against public policy."

Pooling contracts, so-called, were usually made between competing railroads by which either the earnings of the railroads were combined by placing the same under some common authority or control, and then divided, according to a fixed ratio; or the earnings or

receipts of a particular character or class of traffic were combined and divided according to such ratio.

That was the case of *Shrewsbury, etc. Co.* v. *L. & N. W. Ry. Co. et al.*, 2 Mac. & Gord., 324, in which Lord Cottingham held such a contract for a division of earnings between competing roads to be valid, and in which, in 17 Ad. & Ell. (N. S.), 652, a common law court held the same contract to be valid.

See also the similar cases of *Hare* v. *L. & N. W. Ry. Co.*, 2 John. & Hemm., 80, and *Central Trust Company, of New York* v. *Ohio Central Railroad Company*, 23 Fed., 306; and *Nashua, etc., R. Co.* v. *Boston, etc., R. Co.*, 19 Fed., 804, where similar pooling arrangements were sustained.

In the last case, as in some other cases, while it was admitted that an agreement for pooling was illegal at common law, so as not to be enforceable in the courts, yet the court held, where the contract had been performed and nothing remained to be done but to distribute the funds pooled, it would sustain an action to recover the proportion due, not upon the express contract, which was illegal, but upon an implied contract to pay moneys which belonged to the plaintiff, as in an action for money had and received.

In view of the decisions of the latter character it was deemed advisable by Congress, not only to make it unlawful to enter into any contract, agreement or combination for pooling, but also to make it unlawful and prevent, by reason of any such decisions, any actual division of earnings, even in pursuance of an implied or secret understanding, where an illegal contract had been executed. Congress, no doubt, also con-

templated that it might be difficult to prove an actual agreement, yet the fact of a division of the earnings might still be a matter susceptible of proof, and therefore provided in the statute for both cases.

No doubt, in view of the conflict among the courts in this country as to the illegality of such pooling contracts, it was deemed advisable by Congress to set the question at rest by the Fifth Section, and make such contracts or arrangements unquestionably unlawful, and at the same time to make an actual division of earnings, whether a contract was proved or not, also an unlawful thing. Section 5 is altogether criminal and penal in its nature. No private right to recover damages is given under its provisions on account of anything so forbidden to be done.

The word "pooling" however, used in connection with freights, would be an awkward word to cover a mere division of traffic to be thereafter received. In such a case there could be no pooling in the ordinary acceptance of that term.

In Webster's Dictionary a "pool" among railroads is defined as:

"A mutual arrangement between competing lines, by which the *receipts* of all are aggregated, and then distributed *pro rata,* according to agreement."

A similar definition is found in the Standard Dictionary, as follows:

"A combination, whereby railroad companies, or other like corporations, agree to fix rates or prices, and divide the *collective profits* of the business *pro rata,* generally formed to overcome the effects of excessive competition."

"To pool" is defined by Webster:

"*To put together;* to contribute to a common fund, on the basis of a mutual division of profits or losses."

"To pool," in the Standard, is defined:

"*To put into a pool or common fund* to be shared according to agreement, as competing railroads may pool their *earnings.*"

"To pool," therefore, is appropriately used in connection with the words "receipts" or "earnings," since they may be combined and then divided according to an agreed proportion.

The lower court, however, referred to a charge of Judge Hammond to a grand jury, *In Re Pooling Freights,* 115 Fed., 589, wherein it was stated in an oracular way that section 5 of the Interstate Commerce Law contemplated a physical division of traffic. The definition in the Century Dictionary, referred to in his opinion, however, contemplates rather, in respect to transportation lines, a distribution of profits of the business according to a special agreement. Of course, the question involved was not at all debated before him.

Prior to the passage of this law, the usual provision in pooling agreements, as they were regarded as of somewhat doubtful validity, was to place the receipts or earnings from the kinds of traffic covered by the agreement beyond the control of the carriers, the parties to the agreement, by putting such receipts or earnings under some common authority or control to be afterwards distributed by such authority between the carriers in accordance with the percentage agreed upon. This, of course, was a pooling in the proper sense of that term.

The foregoing construction is borne out by the history of the passage of this law. The original "Cullom Bill," which is largely the basis of the present law, introduced in the Senate May 13, 1886, contained the only provision on the subject of "pooling," in section 2 thereof, which read as follows:

"That the said commission shall specifically inquire into that method of railroad management or combination known as pooling, and shall report to Congress what, if any, legislation is advisable and expedient upon that subject."

From this it is obvious that the Senate, in the first instance, was not satisfied that pooling contracts were illegal or objectionable, or that they should be further prohibited. The Senate, therefore, wished further light to be obtained by the proposed commission.

In the original "Reagan Bill," introduced in the House, March 8, 1886, there is found in section 2 thereof the only provision on the subject of "pooling," which read as follows:

"And it shall be unlawful for any person or persons carrying property as aforesaid to enter into any contract, agreement, or combination for the pooling of freights, or to pool the freights of different and competing railroads, *by dividing between them the aggregate or net proceeds of the earnings of such railroads, or any portion of them;* and in any case of an agreement for the pooling of freights or earnings as aforesaid, each day of its continuance shall be deemed a separate offense."

It is obvious that this provision intended only to make it unlawful for carriers, *first, to enter into any contract, etc.,* for the pooling of freights of different and competing railroads *by* dividing between them the aggregate or net proceeds of the earnings of such

railroads, or any portion of them; and, *second*, to pool such freights in the same way, that is, to consummate any such agreement, or in the absence of any proven agreement, any sort of a tacit or implied understanding for such purpose, by actually pooling the freights of different competing railroads *by* dividing between them the aggregate or net proceeds of the earnings of such railroads, or any portion of them.

Not only was the making of such a contract for pooling of freights *by* dividing the earnings made unlawful, but also it was made unlawful to pool in fact the freights of competing railroads *by* dividing the earnings. In that provision, also, as in the present law, in the case of "an agreement for the pooling of freights or earnings as aforesaid," each day of the continuance was made a separate offense; as, without such provision, the making, acting under and carrying out from time to time, such an agreement would have constituted but a single offense, though it necessarily consisted of a series of acts, each and all of which should be prohibited.

The conference committee between the House and the Senate concluded to adopt the provision of the "Reagan Bill" on this subject, and slightly changed the phraseology so as to read as it stands in section 5 of the present law. However, there was evidently no intent to change the meaning of the pooling clause in the "Reagan Bill," or to extend its operation, since the House was apparently satisfied with the provision as it stood, and the Senate, by the "Cullom Bill' evidently considered that there should first be further special inquiry by the commission which was to be

created to determine the advisability of adopting any provision on the subject at all.

Surely, there was no intention evidenced to change the meaning of the word "freights" as plainly used in the "Reagan Bill." The endeavor was to make the section brief or concise.

The act nowhere prohibits contracts fixing rates or restricting competition. The discussions in Congress and the bill show there might be ruinous and senseless competition in cutting rates to the destruction of one of the parties and the ultimate detriment of the public, which it was expected would be obviated by this law. All the arguments were in favor of stability in rates.

Thus, "freights" must be given the meaning of "receipts," which is akin to the word "earnings," for if it be given the other meaning of "traffic" or rather commodities received for transportation, then it would follow that the section would prohibit the making of an agreement for a division of such commodities carried, but it would not prohibit the making of an *agreement* for the pooling of receipts or earnings. It is rather to be supposed that Congress intended to prohibit the making of contracts for pooling of receipts or earnings, which was the common form of such pooling contracts, just as it also prohibited the actual division of earnings where, it was surmised, a prior definite agreement for that purpose might not be susceptible of sufficient proof, or where such a division might otherwise be enforced by the courts under an implied agreement in an action for money had and received,—the illegal contract having been consummated or ended.

In respect to the charge in the complaints before the commission that the defendants pooled their earnings from this traffic, the commission state in their report that the evidence upon which to base a finding in that respect was insufficient or unsatisfactory, and that question was, therefore, reserved for further consideration by them. (Trans., 77.) In view of such a statement, and of the failure to make a finding upon such question, it is, of course, not proper for this court to enter into an original investigation of the matter. Any evidence in the record bearing upon such question is not pertinent to this case.

See,

East. Tennessee, etc. Ry. Co. v. *Interstate Commerce Commission,* 181 U. S., pp. 2, 27 and 28.

L. & N. Rld. v. *Behlmer,* 175 U. S., 674, 675 and 676.

Therefore, we do not deem it proper to discuss any evidence upon that proposition.

The record in this case has been unduly and unreasonably stuffed by plaintiffs' attorneys industriously lugging in a mass of irrelevant and impertinent data and statements not even arising to the dignity of evidence, but which has rendered this record of unwieldy bulk.

There was, however, no agreement shown between competing connecting carriers for any division of this tonnage or traffic. The initial carriers were insisting upon the right to route this traffic, for their own protection, and not for the benefit or protection of any of their connections.

VIII.

ON THE QUESTION OF UNDUE PREFERENCE, AS STATED BY THE COMMISSION AND AS EXPOUNDED BY THE COURTS.

As the lower court, however, did not base its decision upon any assumed violation of section 3 or the "undue preference" clause of the act, probably this court is not called upon to seriously consider any such question. As the subject, however, is touched upon in the conclusions of the commission, out of abundant precaution we will here discuss the same.

The only reference in the report of the commission to any "undue preference" is found in the "*conclusions*" of the commission, *not* made as a "*finding of fact*" by them, and is as follows:

"Our *conclusion* is that the practice of the defendant carriers in denying to the shippers the use of their transportation facilities by the established routes is in violation of the statute, and, in its application by the defendants to the traffic in question, subjects the owners and shippers thereof to undue, unjust and unreasonable prejudice and disadvantage, and gives to the carriers an undue and unreasonable preference and advantage."

This conclusion is simply to the effect that shippers of this traffic are subjected to an unjust disadvantage because the carriers are given an undue advantage by reason of the routing provision. It is not found anywhere that shippers of this traffic are subjected to an undue disadvantage or prejudice as compared with other shippers of any other commodities coming in competition therewith.

Under section 14 it is made the duty of the com-

ssion after an investigation to make a report in iting in respect thereto, "which shall include the *dings of fact* upon which the *conclusions* of the com- ssion *are based.*"

It is then provided:

"* * * and *such findings* so made shall thereafter all judicial proceedings be deemed *prima facie* evi- nce as to each and every *fact found.*"

In section 16 of the act, approved February 4, 1887, originally passed, and being the section which con- rs upon Circuit Courts jurisdiction to investigate d determine the lawfulness of an order or require- ent of the commission, and enforce the same, if lid, it was provided, in respect to the hearing in ch courts:

"And on such hearing *the report* of said commission all be *prima facie* evidence of the matters therein ated."

By the Act of March 2, 1889 (23 U. S. Stats. at arge, p. 55), Congress made a significant amendment the above provision by making it read as follows:

"And on such hearing the *findings of fact in the port* of said commission shall be *prima facie* evi- nce of the matters therein stated."

The intent of Congress is thus clearly manifested this amendment that the "*findings of fact*" in the port, as in the previous section, and not the "*con- usions*" or deductions in the report, should be con- dered as *prima facie* evidence of the matters stated.

It will not do to ignore the above provisions and y they are meaningless. In any event, it must be vious that even "findings of fact" in the report e entitled to just such weight as the report shows

that the commission gave to the consideration of the particular question, and no more. Whatever deference may be due to the commission, burdens should not be unjustly placed upon the carriers because the commission may have failed to give due consideration to the facts or the evidence or the questions involved. The findings of fact in the report of the commission are, after all, merely evidence making a *prima facie* case, and the court in considering such findings in the light of the other evidence introduced should give just such weight to these findings as evidence of the facts as they are entitled to in view of all the evidence, and no more.

See

Western N. Y., etc., R. Co. v. *Penna. Ref. Co.*, 137 Fed., 350 and 351; C. C. A., 3rd Circuit.

Section 3 makes it unlawful for any common carrier:

"To make or give and undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic, in any respect whatsoever, or to subject any particular person, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever."

The commission nowhere find or state that the citrus fruit traffic is subjected to an unjust disadvantage as compared with any other particular traffic; nor that any shipper or shippers thereof are subjected to any unjust disadvantage as compared with any other shipper or shippers in competition. Nowhere does it find

that the shippers of citrus fruit are injured by reason of the initial carriers' not enforcing the routing provision in respect to some other kinds of traffic. No case was presented in the report even of one shipper being subjected to an "unreasonable disadvantage" by reason of some other shipper being given an "undue advantage." Indeed, the evidence very plainly shows that the shippers of this citrus fruit traffic are exceptionally favored and this traffic is given a preference and advantage over all other traffic. It is given a preference in the character of the service rendered in respect to the time of transportation, in the character of cars in which the commodity is handled, in the unusual care that is taken during its transportation, and in the extraordinary and unusual privilege of diverting "tramp cars" while in transit at the expense of the initial carriers,—a privilege not accorded to other traffic or to other shippers.

In respect to the enforcement by initial carriers of the routing provision in the tariffs, usually applied only in relation to this traffic, the evidence abundantly shows that such enforcement was necessary to put an end to the notorious and unlawful practice generally indulged in by shippers of citrus fruit, and through the instrumentality of the private car lines, of soliciting and accepting rebates from connecting lines, the private car lines accomplishing that result through routing the business and selling it to the highest bidder among the connecting lines, greatly to the detriment of the business of the initial lines. *The routing, which was claimed to be such a valuable privilege of the two complainants before the commission was done*

altogether by the private car lines, which sold the same for rebates.

If such an unlawful practice of rebating had been in effect in respect to other traffic, the initial carriers would soon have stopped it by assuming the routing thereof and thus preventing the connecting carriers from making or carrying out any such unlawful bargains.

While the question of "undue preference," etc., is generally a question of fact, depending upon the circumstances of each particular case, yet it is well settled by both the English and American decisions that in order to give a right to a shipper to complain of an "unreasonable disadvantage," etc., he must show that he has been unduly prejudiced by reason of some other shipper being given an "undue advantage" in respect to a commodity which comes in competition.

This was the view taken in the opinion of the late Mr. Justice Jackson, in the case of *Int Com. Com.* v. *B. & O. R. R. Co.*, 43 Fed., 47. Referring to the "undue preference" clause, he says:

"These words necessarily involve the idea or element of comparison of one service or traffic with another *similarly situated and circumstanced*, and require that, to be 'undue and unreasonable,' the preference or prejudice must relate and have reference to *competing parties*, producing between them unfairness and an unjust inequality in the rates charged them respectively for contemporaneous service under substantially the same circumstances and conditions. In determining the question whether rates give an 'undue preference' or impose an 'undue prejudice' or disadvantage, consideration must be had to the *relation which the persons or traffic bear to each other and to the carrier.*"

In other words, the mere fact that in a particular case a preference or advantage has been given to one shipper or one kind of traffic over another is not sufficient to meet the condemnation of this section of the law. The preference or advantage must be "undue" and the prejudice or disadvantage must be "undue and unreasonable." There can be no undue disadvantage if shippers of like freight under similar circumstances are treated alike. There can be no prejudice at all to one shipper, unless some other shipper is given an advantage over him which, in fact, prejudices him. No such prejudice can arise unless the restrictive parties are competitors.

Therefore, in the recent decision of the Circuit Court of Appeals, Seventh Circuit, in *United States* v. *Chicago and Northwestern Ry. Co.*, 127 Fed., 785, it was held that the Government, in the transportation of its troops, could not complain because it was not given the party-rates which the tariffs of the Railway Company provided as open to theatrical troupes and others giving certain kinds of entertainments. It was said that the Government did not move its troops under the party-rate tickets, and, moreover, it was not within the class designated in these tariffs as being a class which was likely to afford more business to the carriers offering the party-rates. It is said in the opinion, with reference to the Government:

"It is not engaged in the same business as any of those classes that are given special rates, *is not in competition with them, and is not therefore injured or discriminated against.* As was said by the Supreme Court in *Interstate Commerce Com.* v. *B. & O. R. R.*, 145 U. S., 263, 'It does not operate to the prejudice of

the single passenger, who cannot be said to be injured by the fact that another is able, in a particular instance, to travel at a less rate than he.' "

The "undue preference" clause in Section 3 of the Interstate Commerce Law was taken practically word for word from a similar clause in Section 2 of the English Railway and Canal Traffic Act of 1854, and the construction thereof prior to its adoption in the Interstate Commerce Law will be followed by the American courts as a part of the statute.

In *Hozier* v. *Caledonian Railway Company*, 1 Nev. & Mac. N. (Railway and Canal Traffic Cases), 27, a railway company, having fixed the rates for passengers traveling between the terminii of the line according to a much lower scale than the rates exigible from passengers traveling between intermediate stations: Held, no one has a title to complain of such proportional rating unless there be a competition of interest. Lord President M'Neill said, in reference to the undue preference clause:

"It does not appear to me to be a matter which the statute provides for at all. It provides for giving undue preference to parties *pari passu* in the matter, but you must bring them *into competition* in order to give them an interest to complain."

This language is quoted with approval in *Interstate Com. Com.* v. *B. & O. R. R. Co.*, 145 U. S., pp. 282 and 283. On page 284 the Supreme Court adds:

"But so far as relates to the question of 'undue preference' it may be presumed that Congress in adopting the language of the English act had in mind the constructions given to these words by the English courts and intended to incorporate them into the statute."

In *Nicholson* v. *Great Western Ry. Company*, 1 Nev.

& MacN. (Railway and Canal Traffic Cases), 150; s. c., 7, C. B. (N. S.), 755, Chief Justice Erle said:

"It is said in the affidavits that Raubon is good hearth coal, and Lydney is in great part good furnace coal. If this be so, it may account for a different demand. In the Catterham case the court declared the necessity for caution in controlling rights on so vague a ground as undue disadvantage to others; and certainly extreme caution is necessary in ascertaining that there is a real grievance, requiring a remedy, before the court interferes so as to annul a very important contract, and to destroy very valuable interests, and to take away the power of making any contracts in future with security."

In *Lees and others* v. *The Lancashire and Yorkshire Railway Company*, 1 Nev. & MacN. (Railway and Canal Traffic Cases), 352, before the Railway Commissioners, where a railway was compelled by the increase of its business to separate mineral from its goods traffic at O. station, and transferred the former to another station, retaining only at O. station the mineral traffic in favor of the corporation of M., who lighted M. and its suburbs, and whose gas works were close to O. station, communicating therewith by a siding, so that such traffic could be removed at once from O. station without impeding the goods traffic, the Railway Commission found that the preference to the corporation was neither undue nor unreasonable. On page 366 they say:

"It is not contended that the Lancashire and Yorkshire Railway Company fail to afford reasonable facilities for coal traffic by placing their depot for coal at Miles Platting; nor does it appear that they designed to subject any particular person to any disadvantage, because, with one exception, the consignees of coal were all alike in a general sense affected by the re-

moval from Oldham Road, and the measure applied indifferently to them all. The exception was the corporation of Manchester, and to that body undoubtedly the Company have given a preference, by carrying coals to Oldham Road Station for them, and for no one else. * * * Of the preference in question before us, we observe, in the first place, that it has not about it certain points or incidents that would at once condemn it. Messrs. Lee, the complainants, were sufferers by the company ceasing to deliver their coal at Oldham Road, where they had incurred expense in acquiring a piece of ground the better to conduct their business. But the preference given to the corporation was not *per se a detriment to them. There was no competition in interest to make it so.* The corporation did not sell coal."

In *Nicholson and another* v. *Great Western Railway Company,* 1 Nev. & MacN. (Railway and Canal Traffic Cases), 121; s. c., 5 C. B. (N. S.), 366, it was held that the undue preference clause was not contravened by a railway company carrying at a lower rate, in consideration of a guarantee of large quantities and full train loads at regular periods, provided the real object of the company be to obtain thereby a greater remunerative profit by the diminished cost of carriage, although the effect may be to exclude from the lower rate those persons who cannot give such a guarantee. Crowder, J., said on pp. 138 and 139:

"When the statute speaks of 'undue and unreasonable preference or advantage' and 'undue and unreasonable prejudice or disadvantage', it uses language implying that there may be advantage to one person or one class of traffic and prejudice to another which would not be within the act of parliament. The preference and prejudice must be 'undue' or 'unreasonable' to be within the statute. And although in the case now before the court, it is quite manifest that the Raubon Coal Company have many and important ad-

vantages in carrying their coal on the Great Western Railway as against the complainants and other coal owners in the Forest of Dean, still the question remains,—are they 'undue' or 'unreasonable' advantages? This mainly depends upon the adequacy of the consideration given in return to the railway company for the advantages afforded to the Raubon Coal Company."

See also:

Jones v. *The Eastern Counties Railway Company,* 1 Nev. & MacN. (Railway and Canal Traffic Cases), 45; s. c., 3 C. B. (N. S.), 718.

Wannan v. *The Scottish Central Railway Company,* 1 Nev. & MacN. (Railway and Canal Traffic Cases), 237; s. c., 3 Sess. Ca., 1373, 3rd Ser.

Bennett v. *Manchester, Sheffield and Lincolnshire Railway Company,* 1 Nev. & Mac N. (Railway and Canal Traffic Cases), 288; s. c., 6 C. B. (N. S.), 707.

In *Phipps et al.* v. *London & North Western Railway Company,* 8 Nev. & MacN. (Railway and Canal Traffic Cases), 83; s. c., Law Reports, Queen's Bench Division, 1893, Vol. 2, p. 236 *et seq.,* Lord Herschell, referring to the "undue preference" clause, said, on page 95:

"The question therefore which the tribunal, whether it be the court or the commissioners, before whom such a question comes, has to determine is whether an undue preference or advantage is being given, or whether the one party is being unduly prejudiced or put to a disadvantage as compared with the other.

I think it is clear that the section implies that there may be a preference, and that it does not make every inequality of charge an undue preference.

Of course, if the circumstances so differ that the difference of charge is in exact conformity with the difference of circumstances, there would be no preference at all. But, as has been pointed out before, what the section provides is that there shall not be an undue or unreasonable preference or prejudice."

Therefore, in the recent English Work by Boyle & Waghorn, published in 1901, entitled "The Law Relating to Railway and Canal Traffic," in Volume I, on page 158, the English cases, construing the "undue preference" clause are summed up as follows:

"The words 'preference' and 'advantage' of themselves give rise to questions of considerable importance.

Applicants occasionally desire to construe these words as the equivalent of 'benefit,' and to claim that whatever conveniences or concessions are granted to one trader or class of traffic are due to be granted to all others.

The courts do not accept this view; there is no question of preference when different matters are under consideration, and *one person is not placed at an advantage over another if their traffic has nothing in common.*

Expressing the point in another form, the courts read both limbs of the preference section together, and hold that *the preference of the first part must be accompanied with the prejudice of the other,* and that *the 'disadvantage' of one must be connected with the 'advantage' of the other,* before the provisions of the section come into operation."

On page 159 they continue:

"In the same manner with merchandise traffic, a colliery supplying cannel coal to gas-works is not aggrieved because common coal, not used for the same purpose, and of much less value, is conveyed at cheaper rates. The coal of North Wales and the steam coal of South Wales *do not compete* at Birkenhead *so closely* that it is incumbent upon the court to ascertain the

precise equivalent of rates for 30 and 150 miles respectively. A coal merchant at Yarmouth receiving his coals by sea has no grievance in respect of land-borne traffic to Yarmouth, however low the rates may be, for he has no traffic affected by it, and a colliery owner is at no disadvantage because the Manchester corporations are allowed facilities for the conveyance to their gas-works which are not accorded to an applicant, who is, however, placed on the same footing as all other coal-owners or merchants *with whom he is in competition.*"

While it is said that the question of undue preference, etc., is generally one of fact just as questions of fraud, undue influence, and negligence, are frequently questions of fact, yet it is manifest that under our system of jurisprudence and constitutional provisions, when a question comes into court it must be determined by some existing rule of law which is applicable to the solution of similar cases.

See, in construing similar statutes:

Hoover v. *Pa. R. Co.*, 27 Atl., 282.

Houston & T. C. Ry. Co. v. *Rust & Dickens*, 9 Am. & Eng. Railroad Cases, 123.

Nothing more can be meant by the statement that it is generally a question of fact than that such question in each particular case will depend upon the many facts and circumstances shown to exist in such case concerning the particular parties and traffic which may be the subject of comparison. In the end it involves a conclusion of law and fact, for some rule of law must be applied to the evidence or facts to reach a conclusion or determination.

It is not permissible in this country to vest a court or commission with arbitrary power of determining a

question which may come before them, except by some rule applicable to similar cases. Such a statute would not afford due process of law. The rights of the parties would depend upon the will of the judge alone. Ours is a government of laws and not of men.

Yick Wo. v. *Hopkins,* 118 U. S., 370.

See also:

Matthews v. *Murphy,* 63 S. W., 785.
L. & N. Rld. Co. v. *Commonwealth,* 99 Ky., 132; s. c., 35 S. W., 129.
L. & N. Rld. Co. v. *Rld. Commr's,* 16 Am. & Eng. Railroad Cases, 15.
Schaezlein v. *Cabaniss,* 67 Pac., 755 (Calif.).
Tillman v. *Cocke,* 9 Baxter (Tenn.), 429, 431.
City of Zanesville v. *Zanesville Tel., etc., Co.,* 59 N. E., 109.
Hubbard v. *Hubbard,* 58 Atl., 969.

To prescribe the rule to decide cases is a legislative act.

Lewis v. *Webb,* 3 Me., 326, 333 and 335.
Osborn v. *Bank U. S.,* 9 Wheat., 738, 819.
Bates v. *Kimball,* 2 Gillman's Vt. Rep., 88.
Hubbard v. *Hubbard,* 58 Atl., 969.

While it is true that under a recent amendment to the English statute, made since passage of the Interstate Commerce Law, the English courts are not now authorized to re-examine a question of fact such as one of "undue preference," as determined by the English Railway Commission, yet they may still examine the decision of the commission and their report and draw inferences from facts found to ascertain

whether the commission gave due weight to matters which should have been considered, and thus determine whether the commission erred in their decision. Our courts must go farther and determine even questions of fact for themselves.

Under the Act of Congress the "findings of fact" made by the commission are merely *prima facie* evidence of the matters stated in the report, and the court in examining into the question must consider all of the evidence introduced, giving *prima facie* effect only to the findings of the commission.

Int. Com. Com. v. *Alabama Midland Ry. Co.*, 168 U. S., 174, 175 and 176.

But if it be true that the question of undue preference is usually one of fact, depending upon the facts and circumstances of the particular case, then it is manifest that neither the commission nor the courts can determine whether one shipper or kind of traffic is subjected to an unjust disadvantage as compared with another shipper or kind of traffic until such a particular case arises and is presented for determination and the facts are ascertained. This can only be done when the shipments have in fact been made.

In *Texas & Pacific Rly. Co.* v. *Int. Com. Com.*, 162 U. S., 197, it was said on page 220:

"The third section forbids any undue or unjust preference or advantage in favor of any person, company, firm, corporation, or locality, and as there is nothing in the act which defines what shall be held to be due or undue, reasonable or unreasonable, such questions are questions not of law, but of fact. The mere circumstance that there is in a given case a preference or an advantage does not, of itself, show that such prefer-

ence or advantage is undue or unreasonable, within the meaning of the act. *Hence it follows that, before the commission can adjudge a common carrier to have acted unlawfully, it must ascertain the facts;* and here again we think it is evident that those facts and matters which carriers, apart from any question arising under the statute, would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the commission in forming its judgment whether such preference or advantage is undue or unreasonable."

For that reason, if for no other, therefore, neither the commission nor the court can assume in advance that the carrier *will* exercise a right so as to subject one shipper to an "unreasonable disadvantage" as compared with another and to the detriment of the former. It cannot, for example, condemn the routing provision in the joint tariffs merely because the carrier might hereafter in some particular isolated instance so exercise the right as to give one shipper an undue preference over another and to the detriment of the latter. When such a case arises the court will be able to determine it and deal with it intelligently. The argument of a possible misuse of a right or power was also urged by the commission as a reason for holding that party-rate tickets were in violation of this law, as they might be utilized by the carrier for the purpose of unjustly discriminating. But that argument urged by them in the case of *Int. Com. Com.* v. *Baltimore & Ohio R. R. Co.*, 145 U. S., 263, was disposed of by this court on page 284, in the following intelligent manner:

"It is possible to conceive that party-rate tickets may, by a reduction of the number for whom they may be issued, be made the pretext for evading the law, and

for the purpose of cutting rates, but should such be the case, the courts would have no difficulty in discovering the purpose for which they were issued, and applying the proper remedy."

In other words, when a case arises the court will deal with it. It would not assume, however, in advance that the right of the railroad company to issue party-rate tickets would be so used as to violate the law.

Indeed, the commission, when composed of such able men as Cooley, Schoonmaker, Walker, Bragg and Morrison, said, in the case of *Holbrook* v. *St. Paul, M. & M. Co.*, 1 Int. Com. Rep., 325:

"As the facts did not show any violation of the law occurring since the Act was passed under which the commission is acting, but only a fear that there might be such a violation, the commission might, with entire propriety, have advised the parties that they should wait until it was seen whether their fears of misconduct on the part of the defendant were to be realized; *the commission having no authority to anticipate violations of law, or to issue mandatory process upon suppositions or fears that any such violations will take place.*"

It is well settled that a court of equity cannot grant an injunction to allay the fears and apprehensions of individuals. It must be shown not only that the alleged forbidden acts are threatened, but will in all probability be committed to the injury of complainant. A mere threat or an act which may upon some contingency or at some remote time prove a nuisance would not warrant the interference of the court. The injury must not be contingent merely, and apprehension on the part of complainant of a possible or speculative harm will not be enough.

See 16 Am. & Eng. Enc. of Law (2d Ed.), 361.
Bisp. Eq. (3d Ed.), p. 492.
1 High Inj. (3d Ed.), Sec. 886.

But until there was *something done in violation of that law* the power or jurisdiction of the commission did not arise.

IX.

THE ORDER OF THE COMMISSION IS TOO BROAD TO BE SUPPORTED UPON THE GROUND THAT AN UNDUE PREFERENCE MIGHT BE MADE BY THE CARRIER. THE ORDER IS NOT RESPONSIVE TO ANY FINDING OR CASE OF UNDUE PREFERENCE STATED IN THE REPORT.

The order is not confined in its operation to cases in which the initial carrier might be guilty of giving an undue preference under the law, but forbids the carrier from exercising the right to route in any case whatever, where through joint rates are made. The carrier should be at liberty to remove the unlawful preference in a particular case complained of in any other way.

Thus in the case of *Detroit, G. H. & M. Ry. Co.* v. *Int. Com. Com.*, 74 Fed., 803, the commission made an order which though founded upon an unlawful preference between two different localities absolutely prohibited the discriminating charge and the Circuit Court of Appeals held the order erroneous because not allowing the carrier any liberty to remove the unlawful preference in any other way. On page 840 and 841 the court said:

"From what has been already ruled, it is apparent that even if the commission had established by its inquiry, an abuse to be remedied, the order it gave was not a proper one and should not be enforced. Large as its powers may be and plenary as may the authority

of the court to enforce by mandatory injunctions or otherwise, obedience to its orders, its powers are those of regulation and not construction or reconstruction. *Interstate Commerce Commission* v. *Baltimore & O. R. R. Co.*, 43 Fed., 37, 50; and 145 U. S., 263, 12 Sup. Ct., 844. And now see *Cincinnati, N. O. & T. P. Ry. Co.* v. *Interstate Commerce Commission* (Oct. 1895), 16 Sup. Ct., 700. That is, as the commission has made it, a dispute about discriminating rates, and the easy remedy on such a complaint, is a re-adjustment of the rates to cover the discrepancy. As was said in one of the cases we have cited, the method of redress by readjusting the rates must always be left to the choice of the company, at least in the first instance; and in the subsequent St. Louis case, *supra*, the commission adopted that course, and made the proper order. *Here was an arbitrary and peremptory order to abandon the accessorial cartage at Grand Rapids, without regard to any rates, or without option as to readjustment of them, the defendant company not even being allowed the alternative of establishing a like service at Ionia.* It is, in its nature, not a regulation of commerce, as much as an interference with the rights of property and its use, which possibly even Congress could not in this way prohibit. At all events, it is an attempted exercise of a legislative power which Congress has not, we think, conferred upon the commission."

Concerning a claim that a certain charge had been found inherently unreasonable by the report of the commission, the Supreme Court said, in *East Tenn., etc., Rly. Co.* v. *Interstate Com. Com.*, 181 U. S., 1, on p. 23:

"As the Circuit Court only affirmed the order of the commission which directed the carriers to desist from charging a greater compensation for the shorter haul to Chattanooga than for the longer haul to Nashville, there is no room for the conclusion that it found affirmatively that independently of the charge to Nashville the rate to Chattanooga was *per se* unreasonable. For, of course, a decree which ordered the carriers to

desist from charging a greater compensation for the lesser than for the longer haud, would be *in no way responsive to the conclusion* that the rate for the lesser distance was unreasonable in and of itself."

On page 26, in the same case, it is said:

"The decree which was entered, however, did not declare the rates charged to Chattanooga to be unreasonable, but simply affirmed the order of the commission directing that no greater sum be charged for the carriage of freight to Chattanooga, the shorter, than was exacted to Nashville, the longer, distance. As we have already shown, such a decree is not *responsive to the conclusion* that the rates to Chattanooga were in and of themselves unreasonable, since the right to continue to exact them was sanctioned, provided the traffic to Nashville was either abandoned or the rate to Chattanooga made the same as to Nashville."

The order, however, is not directed to cases or instances of undue preference, but in all cases forbids the initial carrier to route otherwise than as directed by the shipper. It is not responsive to a finding or conclusion of undue preference.

X.

NEITHER ARE THE INITIAL CARRIERS AFFORDED AN UNDUE OR UNREASONABLE PREFERENCE OR ADVANTAGE.

If, on the other hand, the commission intended to say, as they probably did, that the shippers of citrus fruit traffic were subjected to an unjust and unreasonable prejudice upon the ground possibly that the routing provision gave the initial carriers an undue or unreasonable advantage, then the argument heretofore made still applies to the disposition of such question. The carriers are not in competition with the shippers.

A carrier may lawfully obtain an advantage by offering or affording the shipper a consideration, that is, by doing something which the carrier is not obliged under the law to do. It is true that in England the carriers, by their peculiar methods of doing business, sometimes come in competition with the public. It is in those respects only in which they do not act as carriers. In that country they not only collect the goods for transportation, but also make a personal delivery. In these respects they come in competition with draymen, carters, and other collectors and distributors of freight. In some instances it was, therefore, held that they could not adopt rules in respect to the collection of freight which would shut out other collectors of freight, thereby giving themselves in that respect an unjust advantage over others who were competing with them in business of the same character. Such cases cannot arise in this country, as the business of common carriers is not conducted in that respect as in England, if indeed those decisions would be followed here, which may well be doubted. There is nothing objectionable, however, in a common carrier acquiring an advantage over the shipper, especially where a consideration is afforded to the shipper therefor. Such a consideration is afforded wherever the carrier undertakes to do for, or to give to, the shipper something which it cannot be compelled to do, give or furnish under the law. The initial carriers make joint through rates and offer them to the shipper upon condition that such carrier shall route over connecting lines. As they are not obliged to make such rates or enter into such arrangements, when they do so upon the condition stated, they afford the shippers a consideration for a waiver

of the supposed right of routing. The case is identical with that in which a carrier undertakes by its tariffs and uniform bills of lading issued thereunder to carry for shippers who ship under a bill of lading releasing the carrier from certain liabilities at a lower rate than is accorded to those shippers who insist upon shipping at the carrier's risk.

See *Manheim Insurance Co.* v. *Erie W. Transportation Company,* 75 N. W., 602.

Now, where goods are shipped under a bill of lading limiting the carrier's liability, certainly the carrier obtains an advantage. The advantage, however, is not unjust, because in the first place the shipper receives a *quid pro quo;* and, in the next place, the carrier is not in competition with the shipper and the shipper is, therefore, not in a position to claim to be injuriously affected by reason thereof. The shipper cannot secure the advantage of this arrangement which the law does not accord him, and at the same time reject any disadvantage incident to such an arrangement. It is not such an advantage or disadvantage as is within the contemplation of this law.

Indeed, it has been held that in determining the question even of undue preference in favor of one shipper to the unjust disadvantage of another shipper, the courts must take into consideration the fair interests of the railway company itself, and in any controversy which may arise under this law such interests cannot be ignored.

See

Ransome v. *Eastern Counties Ry. Co.,* 1 Nev.

& MacN. (Railway and Canal Traffic Cases), 63; s. c., 1 C. B. (N. S.), 437.

Oxlade v. *Northeastern Ry. Co.*, 1 Nev. & MacN. (Railway and Canal Traffic Cases), 72.

Nicholson v. *Great Western Ry. Co.*, 1 Nev. & MacN. (Railway and Canal Traffic Cases), 121; s. c., 5 C. B. (N. S.), 366.

Harris v. *Cockermouth & Workington Ry. Co.*, 1 Nev. & MacN. (Railway and Canal Traffic Cases), 97 and 104.

In *Ilwaco Ry. and Navigation Co.* v. *The Oregon, etc., Ry. Co.*, 57 Fed., 673, it is said on page 676:

"For a carrier to prefer itself in its own proper business is not the discrimination which is condemned."

Thus, in *Little Rock, etc.*, v. *Eastern Tenn., etc.*, 47 Fed., 771, it is said (page 775):

"It cannot be either an undue or unreasonable discrimination against the plaintiff to afford for passengers superior facilities, such as through tickets, shorter rates, or the like, over its own road, in preference to that of its rival, running a road part of the way in the same direction. For illustration, if a passenger wishing to go from Texarkana or further on from some point in Texas to Memphis or beyond desires to travel over the Iron Mountain road, why should it not take him all the way to Memphis, and deliver him to the East Tennessee and Georgia, or some other road wishing to take him on easy terms as to rates, through tickets, and the like, rather than shunt him at Little Rock, upon the plaintiff's road? It cannot be an unfair or an unreasonable discrimination against the plaintiff for the Iron Mountain to keep him on its own road by offering him superior facilities in the respects mentioned. * * * It would be free of such imputation because it has a line of its own covering the same

distance, and may prefer itself to others, as we all do in obedience to human nature."

That is to say, the Santa Fe Companies are perfectly justified in insisting that through business received by them in Southern California destined to Chicago, for example, shall go over their rails the entire distance instead of being dropped at Pueblo, Burton, Kansas City, or other intermediate points, and transferred over some connecting line which might only be able to take away the traffic and secure the business by offering or giving unlawful rebates. When the Santa Fe thus prefers itself to others it is free from the imputation of unreasonable discrimination. It is justified in increasing by all means not prohibited its own traffic or getting as much traffic as possible for its own line. It risks its capital for legitimate business returns or profits.

XI.

THE ORDER IN QUESTION IS UNLAWFUL BECAUSE LEGISLATIVE IN ITS NATURE, IS NOT CONFINED IN FAVOR OF THE COMPLAINANTS NOR TO THE CASE BEFORE THE COMMISSION, BUT IS INTENDED GENERALLY TO CONTROL THE CONDUCT OF THE CARRIERS IN ALL FUTURE CASES AND CONTROVERSIES AND IS SUCH AN ORDER AS THE COMMISSION HAS NO AUTHORITY TO MAKE.

The order in question is not confined to the complainants before the commission, nor in its operation to the particular joint tariffs under consideration by the commission. It operates upon the initial carriers in respect to future agreements for joint rates or

tariffs. It operates in favor of every shipper of citrus fruit who specifies a desire to route, and compels the carrier in all future cases which may arise to transport at the joint through rate, at the same time abrogating the essential provision or condition upon which such joint rate is based, and permitting the shipper to route as he may please.

The commission has undertaken to pass on cases of parties not before the court and the decision made would have no mutual binding effect as between the railway company and such parties. The complainants before the commission, by their own conduct were not entitled to relief, and a court of justice would not have granted them relief in the premises, yet by this indirect and unauthorized way they are given the benefit of an order which no court would think of making in their favor.

In *Post* v. *Southern Ry. Co.*, 52 S. W., on page 309, the court refused complainants relief because they had utilized their privilege of routing for the purpose of obtaining rebates, and the court said they did not come into court with a clear right and with clean hands to ask relief which was so extraordinary . On page 310 it is said:

"The effort then resolves itself into one by which eastern consignees seek to create a monopoly in the carriage of cotton by the Star Union Line wherever it enters or passes through its territory, and this because of some undisclosed secret arrangement by which either consignees or shippers obtain rebates and concessions not enjoyed by other freight or railroad lines. *The courts cannot be used to carry such an arrangement into effect. It is true, other reasons are assigned why this fast freight line is preferred, but they are*

to a considerable extent specious, and the fact remains that the rebate or concession is an important, if not controlling feature."

The lower court seemed to think that because the commission itself appeared as plaintiff to have its own order enforced in court therefore it became immaterial whether or not the complainants before the commission had acted so unconscionably as to be barred of relief in the nature of the order promulgated, the court stating that the commission was now acting on behalf of the public.

Section 16 provides that a petition to the court asking enforcement of a lawful order or requirement of the commission may be filed either by the commission or "and company or person interested in such order or requirement". It was not thought that the order could be made broader, nor that it became more sacred because the commission might appear in court to champion it than if the complainants before the commission appeared for that purpose.

The making of such a general order and the application of the commission to have it enforced should such a conclusion be reached would deprive the defendants of a very essential defense which was made before the commission and which they should be permitted to make in court,—namely, that the complainants before the commission sought relief with unclean hands and sought to use the commission as an intermediary to secure to them opportunities for continued violations of this law. Unless such equitable defense be available, why should it have been provided in section 16 that the court shall proceed to hear and determine the matter "speedily as a court of equity" but

without formal pleadings applicable to ordinary suits, "but in such manner as to do justice in the premises."

If complainants were not entitled to relief by reason of their inequitable and unclean practices, can the commission by this shift of positions hold up the defendants to be further raided by these law breakers?

The commission has simply enacted a rule of conduct to be enforced against the carriers by the mandatory injunction of the federal court. It is as broad as a legislative enactment, and as general and imperious as a decree of a Roman emperor. The court is called upon to enjoin the defendants to obey a rule of the commission which the commission conceived to be the law, and the rights of the carriers in cases which may hereafter arise are thus prejudged and predetermined. They are cut off from testing their rights in any cases which may hereafter arise, and the rights of the respective parties are not determined in an orderly proceeding after a particular case has arisen, but will be determined only by summary proceedings in contempt. Such a course has not yet been authorized by the statute.

Southern Pacific Co. v. *Colorado Fuel & Iron Co.*, 101 Fed. 785.

Authority for making such a general order cannot be found in any language in the Interstate Commerce Statute. It is true the commission may make certain administrative orders or regulations applicable to all carriers in regard to form of schedules, publication of tariffs, making reports, and several other matters specifically prescribed. In the enactment of this law it must be remembered that the Cullom Bill in the Senate

alone provided for the creation of a commission. The House was opposed to any commission to enforce the law, but as it was suggested shippers were not obliged to go before the commission but might go into court, and that the object of the commission was merely to secure evidence for the shipper or an easy method of proving cases for the recovery of damages arising out of violations of the law, the House acceded to such provisions in the Senate Bill.

Section nine, therefore, provided that any person who claimed to have been damaged might either bring an action in a Circuit or District Court of the United States or file a petition before the commission to have his damages ascertained. It was, no doubt, supposed that the commission would make some order in such a case which might be enforced under section sixteen as originally passed, and when it was afterwards discovered that if the claim exceeded twenty dollars the defendant would be entitled to a trial by a jury under the Constitution, section sixteen was amended, in 1889, so as to in terms cover an order made by the commission requiring the defendant to make reparation in damages.

Section sixteen, outside of the amendment thereto made in 1889, specifically authorizing the enforcement after a jury trial of an order for reparation in damages, does not pretend to define a lawful order or the authority of the commission to make general orders and such authority must therefore be pointed out in some other section or provision. It is not to be assumed it was intended to permit the commission to formulate after a hearing orders of such a general nature as a court would not be authorized itself to

make. The practice indulged in is so unusual and anomolous as to justify the inference that no such power was intended to be conferred. Courts cannot lawfully assume or presume secret purposes that are not indicated or expressed by the language or terms of the statute itself and then enact provisions to accomplish these supposed intentions.

Section thirteen generally authorizes petitions by persons and associations or societies, etc., to be made before the commission, claiming alleged violations of the provisions of this law by a common carrier, or the commission may, on its own motion, investigate in respect to violations of this law. Complaints may be made by parties who have no legal interest or right to relief.

Under section fourteen it is to make a report of the result of such investigation, and these reports may be published by the commission for public information. This section also seems to be a section on evidence, to the effect that findings of fact in such report shall be *prima facie* evidence of such facts in subsequent judicial proceedings.

Section fifteen provides that if it appear in any investigation that anything has been done or omitted to be done in violation of that statute by any common carrier, or that any injury has been sustained by any party complaining, it shall be the duty of the commission to cause a copy of the report in respect thereto to be delivered to the common carrier, together with a "*notice*" to such carrier "*to cease and desist*" from such violation and make reparation for the injury done, within a given time, and if the carrier shall com-

ply with such notice or warning it "shall thereupon be relieved from any further liability or penalty for such particular violation of law."

Now this is evidently the section under which the commission assumed to act in making its order, but it must be admitted that there is a vast difference between a requirement *to give* "*notice*" and authority to make an order of a legislative nature which may be enforced by injunction in the courts. The alleged order of the commission is that defendants "are hereby *notified* and required to wholly *cease and desist,*" etc., after a fixed date, etc., concluding that "notice" be sent to defendants "under the provisions of the fifteenth section" (Rec., 84 and 113), thus showing the commission supposed its power rested on that section.

The manifest purpose of this section is to afford the carrier an opportunity for immunity for anything done contrary to that law, and by complying with the notice or recommendation of the commission it is afforded an opportunity to repent and thus be freed from penalties which would otherwise attach.

The act in question was considered at the time as largely experimental, and one of the great purposes was to afford publicity, it being supposed that this would have a beneficial effect upon the carriers. The purpose of such investigations also was to obtain information for future legislation, as the commission is required to report to Congress. (See section 21.)

The order in question is not judicial because it is not confined to the case made by the pleadings before the commission, nor to the parties, as it is broader and is made to inure in favor of the public generally. It

is legislative in its nature. It is not an administrative order or regulation, such as is made by the executive department as to mere matters of detail regulating the mode of proceeding to carry into effect the law, where the statute gives such specific power to make regulations which of course must apply generally to all alike. (*Morrill* v. *Jones*, 106 U. S., 466.) The statute in question enumerates certain particulars wherein the commission may make purely administrative orders or regulations, as stated heretofore, such as in respect to the form of tariffs, publication of joint tariffs and the relaxation of section four and requiring railways to make reports or returns in respect to various matters. One object of the law was to secure publicity, which it was well supposed would cure or do away with many abuses. No language which can be pointed out in the act gives the commission the power to make a general order of the nature of that made in this case. This statute does not invest the commission with legislative power.

Interstate Com. Com. v. *C. N. O. & T. P. Ry. Co.*, 76 Fed., 184.

Farmers L. & T. Co. v. *Nor. Pac. Ry. Co.*, 83 Fed., 268.

In *Interstate Com. Com.* v. *Railway Co.*, 167 U. S., 479, on page 501, it is said:

"The power given is the power to execute and enforce, *not to legislate*. The power given *is partly judicial*, partly executive, and administrative, but not *legislative*."

See, also,

Int. Com. Com. v. *Alabama R. R. Co.*, 168 U. S., 161, 162.

In *Texas and Pacific Ry. Co.* v. *Interstate Com. Com.*, 162 U. S., 216, it was even then doubted whether the commission had the power to make such general orders, and it was said:

"Congress had not seen fit to grant legislative powers to the commission."

On page 220 it is said:

"Hence it follows that before the commission can adjudge a common carrier to have acted unlawfully, it must ascertain the *facts;* and here again we think it evident that those facts and matter which carriers, apart from any question arising under the statute would treat as calling, in given cases, for a preference or advantage, are facts and matters which must be considered by the commission in forming its judgment whether such preference or advantage is undue or unreasonable."

Facts concern an existing or past state of events. Surmises and conjectures concern the future. The facts concerning a given case or transaction can never be known until the thing has occurred, and the transaction has taken place.

In Cooley's Constitutional Limitations (6th ed.), pages 108 and 109, it is stated:

"And it is said that that which distinguishes a judicial from a legislative act is that the one is a determination of what the existing law is in relation to some existing thing *already done or happened*, while the other is a predetermination of what the law shall be for the regulation of all future cases falling under its provisions."

Further on he says:

"It is the province of judges to determine what is the law upon existing cases. In fine, the law is *applied* by the one and *made* by the other. To do the first, therefore,—to compare the claims of parties with the

law of the land before established—is in its nature a judicial act. But to do the last—to place new rules for the regulation of new controversies—is in its nature a legislative act; and if these rules interfere with the past or the present, and do not look wholly to the future, they violate the definition of a law as 'a rule of civil conduct'; because no rule of conduct can with consistency operate upon what occurred before the rule itself was promulgated."

In 2 Chitty's Blackstone, Book 3, star page 25, it is said:

"In every court there must be at least three constituent parts,—the *actor, reus,* and *judex;* the *actor* or plaintiff, who complains of an injury *done;* the *reus,* or defendant, who is called upon to make satisfaction for it; and the *judex,* or judicial power, which is to examine the truth of the facts, to determine the law arising upon that fact, and *if any injury appears to have been done,* to ascertain, and, by its officers, to supply the remedy."

In *Merrill* v. *Sheburne,* 1 N. H., 199; s. c., 7 Am. Dec., 52, Woodbury, Judge, said:

"On general principles, therefore, those inquiries, deliberations, orders and decrees, which are peculiar to such a department, must, in their nature, be judicial acts. Nor can they be both judicial and legislative, because a marked difference exists between the employments of judicial and legislative tribunals. The former decide upon the legality of claims and conducts; the latter make rules upon which, in connection with the Constitution, those decisions should be founded. It is the province of judges to determine what is the law upon existing cases. * * * In fine the law is applied by the one and made by the other. To do the first, therefore, to compare the claims of parties with the laws of the land before established, is, in its nature, a judicial act.

But to do the last, to pass new rules for the regulation of new controversies, is in its nature a legislative act; and if those rules interfere with the past or the

present and do not look wholly to the future, they violate the definition of a law 'as a rule of civil conduct.' I. Bl. Com., 44. Because no rule of conduct can, with consistency, operate upon what occurred before the rule itself was promulgated.

It is the province of the judicial power also to decide disputes 'between or concerning persons,' but of legislative power to regulate public concerns, and to 'make laws' for the benefit and welfare of the state."

Therefore, in determining that the commission was not invested with the legislative power of making a schedule of rates which should control the carriers in respect to their charges for services to be rendered in the future, the Supreme Court very properly stated, in *Int. Com. Com.* v. *Railway Company*, 167 U. S., on page 493:

"The reasonableness of the rate, in a given case, depends on the *facts*, and the function of the commission is to consider these facts and give them their proper weight. If the commission, instead of withholding judgment in such a matter until an issue shall be made and the facts found, itself fixes a rate, that rate is prejudged by the commission to be reasonable."

On page 499 it is said:

"It is one thing to inquire whether the rates which *have been charged and collected are reasonable*—that is, a judicial act; but an entirely different thing to prescribe rates which *shall be charged in the future*—that is a legislative act."

In consonance with the above rule, it is, therefore, held that a court of equity cannot declare future rights, but must leave them to be determined when they come into possession.

In *Cross* v. *De Valle*, 1 Wall., pp. 14 and 15, it is said:

"A chancellor will not maintain a bill merely to

declare future rights. The Scotch tribunals pass on such questions by 'declarator,' but the English courts have never assumed such power. In *Langdale* v. *Briggs*, Lord Justice Turner remarks: 'As long as I have known this court, now for no inconsiderable period, I have always considered it to be settled that the court does not declare future rights, but leaves them to be determined when they may come into possession. In all cases within my experience, where there have been tenancies for life with remainders over, the course has been to provide for the interests of the tenant for life, reserving liberty to apply upon their death.''

As an exercise of judicial power the order is too broad and sweeping, not confined in its effect to the parties to the proceedings or the issues; it lacks mutuality as a decision in that other shippers are benefited and the order inures in their favor, though in no sense precluding them should they wish to institute original proceedings in court under Sec. 9, which requires them to elect.

Teamster v. *Blackstock*, 83 Va., 232; s. c., 5 Am. St. Rep., 262.

Reynolds v. *Stockton*, 43 N. J. Eq., 211; s. c., affirmed in 140 U. S., 266 to 269.

Windsor v. *McVeigh*, 93 U. S., 283.

1 Freeman on Judgments (4th ed.), Sec. 120.

What was generally understood to be the scope of this law at the time of its passage is well illustrated in a case decided by the Supreme Court of Oregon, November 5, 1888. In *Board of Railroad Commissioners of Oregon* v. *Oregon Railway and Navigation Co.*, 19 Pac., 702, a statute of that state couched in language similar to that of the Interstate Commerce Law, par-

ticularly sections 13, 14, 15 and 16, was under consideration. It was held that it would not be presumed that the act intended to give the board authority to adjust matters investigated or to make an order requiring the railway company to refund to a shipper a sum of money alleged to have been exacted from him in excess of a reasonable charge for the shipment.

On page 705 it is said, referring to the sections authorizing the commission to hear and investigate complaints:

"Said sections endow the Board of Commissioners created by the act with ample power to investigate the subjects. This was obviously done in order to enable the legislature to judge as to whether the railroad management was such as was calculated to conserve the best interests of the public; whether the public were being dealt fairly with by those in charge of such management, and whether changes could not be made which would be beneficial to the community. The state has an interest in such matters, and it is highly proper that the legislature should inquire into them; and should it ascertain that the railroad companies were pursuing a selfish, mercenary course, and disregarding the rights of their patrons, it could provide suitable regulations to remedy the mischief."

On pages 704 and 706 are set out certain provisions of that act showing a similarity with the Interstate Commerce Law.

On pages 706 and 707 it is said:

"The first question arising would be, what contentions between the railway company and such persons, firms, etc., has it jurisdiction of? The answer to that question cannot be left to speculation. The jurisdiction of such commissions is not given by implication. Commissions of that character are mere creatures of the statute, and possess no power except what the statute

expressly confers upon them. * * * While it might be inferred from sections 12, 13 and 14 that its object was to constitute the board a kind of tribunal of conciliation to adjust the claims of persons against the railroad companies and to establish *prima facie* evidence of their validity. And section 15 makes a very lame attempt to compel satisfaction of them. What kind of claims it was intended the board should adjust and require to be satisfied does not appear. If its jurisdiction, however, in that particular is co-extensive with its authority to investigate such affairs, it must necessarily extend to claims arising out of torts as well as contracts; as it is required by section 18 of the act to investigate the cause of any accident on any railroad resulting in the loss of life and of any accident not so resulting which it may deem to require investigation. * * * It will not be contended that the act gives the board jurisdiction in express terms to determine when freight charges are unreasonable; and if the question is left to inference there is no limit to the extent of its jurisdiction except the limitation of its authority to investigate, and that seems to extend to all the affairs between the railroad corporations and individuals or associations, and to involve every breach of duty of the former and the consequences attending it.

It has for a very long time been considered the safer and better rule, in determining the question of jurisdiction of boards and officers exercising powers delegated to them by the legislature, to hold that their authority must affirmatively appear from the commission under which they claim to act. *There is too strong a desire in the human heart to exercise authority and too much of a disposition upon the part of those intrusted with it to extend it beyond the design for which and the scope within which it was intended it should be exercised, to leave the question of its extent to inference.* Should it be so left serious disturbances might arise, involving a conflict of jurisdiction, which would be highly detrimental to the community. It is not, it seems to me, requiring too much of the *leg-*

islative branch of the Government to exact, when it creates a commission and clothes it with important functions, that it *shall define and specify the authority given it so clearly that no doubt can reasonably arise in the mind of the public as to its extent.*"

So under a New York statute creating a board of railroad commissioners, and authorizing it to investigate and give notice to the railroad companies of certain things, it was held in *People* v. *N. Y. L. E. & W. R. Co.*, 104 N. Y., 58, 66 and 67; 9 N. E., 856, cited and approved in *N. P. R. R. Co.* v. *Dustin*, 142 U. S., 503, that this amounted to nothing more than an inquest for information and had no effect beyond the advice to the railroad company and suggestion to the legislature for additional legislation.

A similar decision was made in *State ex rel. Attorney General* v. *Mo. Pac. Ry. Co.*, 55 Kas., 708; s. c., 41 Pac., 964.

In Lewis' Sutherland on Statutory Construction (2nd ed.), section 562, it is said:

"Power is generally given to some officer to do acts for the enforcement of such duties; then two principles concur to require strict construction; the second is that which applies to all statutory powers. They are strictly construed."

In Sec. 564 it is said:

"Where special powers are conferred on a court either of otherwise general or limited jurisdiction it is rigorously restricted to those granted, and the grant itself is strictly construed; the jurisdictional facts must appear on the face of the proceedings. The court can take no additional power from its general jurisdiction. In the exercise of such special powers it is precisely limited to those plainly delegated. *Nothing is to be presumed which is not expressly given.*"

See, also, Secs. 565, 567 and 568.

As the commission under section thirteen is authorized to entertain complaints of associations or municipalities which have no legal interest or right to relief, and may also investigate on its own motion, and in all such investigations it is provided that the findings of fact of the commission shall be *prima facie* evidence in subsequent judicial proceedings, it is quite obvious that the commission in this respect is created by the legislature an agency to ascertain the facts, which ascertainment may be used as evidence in subsequent but appropriate judicial proceedings. It is a statute in that respect on the subject of evidence. That which was intended to operate merely as a rule of evidence in subsequent litigation was hardly intended to afford power to make or fix a rule of law as prescribing a measure of duty. Was it intended to put it in the power of the commission to make a general order against one road, thus prescribing and fixing its duty to the public under certain circumstances and omit to affect other roads though the circumstances might be similar? Would not that make possible the worst form of special legislation? Was it intended to invest this administrative board with such great opportunities for favoritism or oppression? (*Mayor, etc., of Baltimore* v. *Radecke*, 49 Md., 230 and 231.)

XII.

MARKED DIFFERENCE BETWEEN THE ENGLISH STATUTES AND THE INTERSTATE COMMERCE LAW IN RESPECT TO GENERAL ORDERS OR INHIBITIONS.

In marked contrast with the omission of this statute to confer power upon the commission to make an order such as the one involved in this case, is the provision of section three of the English Railway and Canal Traffic Act of July 10, 1854, set forth on page 2, 1 Nev. and MacN. (Railway and Canal Traffic Cases.) That section authorized any company or person complaining against any railway company of anything done or of any omission made in violation or contravention of that act, to apply in a summary way to the Court of Common Pleas or a judge thereof. That court was authorized to hear the complaint against the railway company, and if it appeared to the court that anything had been done, or any omission made in violation or contravention of the act, it was then provided,—"it shall be lawful for such court or judge to issue a writ of injunction or interdict, restraining such company or companies from further continuing such violation or contravention of this act, and enjoining obedience to the same." Here, specific power was given to enjoin a further continuing violation of the act, but the order in any event was confined to the parties in court. The court did not feel competent to prejudge and determine rights of parties not before it or adjudge cases not involved.

The duties imposed upon that court by certain pro-

visions of that act, as in the determination of questions of undue preference, no statute defining that term, were regarded by the judges as not judicial, but the judges of the Common Pleas Court voluntarily undertook to exercise the jurisdiction conferred.

See 1 Hodges on Railways (7th Ed.), by J. M. Lely, Note (a), p. 471.

In the subsequent Act of July 21, 1873, this jurisdiction was transferred to the railway commissioners. In Section 6 of that act, found on page 6, 1 Nev. & MacN. (Railway and Canal Traffic Cases), a similar complaint as authorized under the Railway and Canal Traffic Act might be made to the railway commission, and it was provided:

"And for the purpose of enabling the commissioners to hear and determine the matter of any such complaint, they shall have and may exercise all the jurisdiction conferred by section three of the Railway and Canal Traffic Act, 1854, on the several courts and judges empowered to hear and determine complaints under that act; *and may make orders of like nature with the writs and orders authorized to be issued and made by the said courts and judges;* and the said courts and judges shall except for the purpose of enforcing any decision or *order* of the commissioners, cease to exercise the jurisdiction conferred upon them by that section."

Under Section 26 of the same act, on page 12, 1 Nev. & MacN. (Railway and Canal Traffic Cases), it is provided:

"*Any decision or any order made by the commissioners for the purpose of carrying into effect any of the provisions of this act may be made a rule or order of any superior court,* and shall be enforced either in the manner directed by section three of the Railway

and Canal Traffic Act, 1854, as to the writs and orders therein mentioned, or in like manner as any rule or order of such court."

In Section 29 of the same act, found on the same page, the commissioners were authorized to make certain general orders.

The power of the Railway and Canal Commission was further increased by the act of August 10, 1888. See 6 Railway and Canal Traffic Cases, p. XVIII, *et seq.*

The latter statute, of course, was not before Congress at the time of the passage of the original Interstate Commerce Law, but it is obvious that with this early English legislation before it (and in part adopted) Congress did not intend to confer similar or as great power upon the Interstate Commerce Commission as was conferred upon the Common Pleas Court, or the Railway and Canal Commission, or it would have done so by making similar provisions in unequivocal terms. Such extraordinary power should be found in the plain letters of the statute, if intended to be conferred.

XIII.

THE JURISDICTION OF THE FEDERAL COURTS IS ONLY TO DETERMINE THE LAWFULNESS OF THE ORDER IN QUESTION, AND IF LAWFUL TO ENFORCE OBEDIENCE TO THE SAME, OTHERWISE TO DISMISS THE BILL. THEY HAVE NO POWER TO MAKE ANOTHER OR DIFFERENT ORDER OR MODIFY THE ONE MADE.

This is self-evident from Section 16 of the statute. The lawfulness of the order of the commission is made

the subject matter for judicial investigation and determination in the courts, and if it be made to appear to the court on the hearing that the lawful order or requirement of the commission drawn in question has been violated or disobeyed by the defendant it shall be lawful for the court to issue a writ of injunction to restrain such common carrier from further continuing such a violation or disobedience of such lawful order or requirement of the commission.

The jurisdiction is special, and the court has no power to make a different order, and if the order as made requires modification it is quite evident that it is not a lawful order, and therefore not enforceable. The order must stand as made or fall entirely.

See

Int. Com. Com. v. *L. & N. R. R. Co.*, 73 Fed., 409.

Int. Com. Com. v. *D. L. & W. R. R. Co.*, 74 Fed., 723.

D. G. H. & M. R. R. v. *Int. Com. Com.*, 74 Fed., 803, 841.

Farmers' L. & T. Co. v. *N. P. Co.*, 83 Fed., 249.

Int. Com. Com. v. *Western New York, etc., Co.*, 82 Fed., 192.

XIV.

THE ORDER OF THE COMMISSION WAS INVALID BECAUSE THE CONNECTING CARRIERS WERE NOT MADE PARTIES TO THE PROCEEDINGS BEFORE THE COMMISSION AND THE COMMISSION HAD NO POWER TO ADJUDICATE THE PROVISION IN THE JOINT TARIFF AGREEMENT TO BE INVALID WITHOUT HAVING BEFORE IT THE CONNECTING CARRIERS WHO WERE PARTIES TO THAT AGREEMENT AND GIVING THEM AN OPPORTUNITY TO BE HEARD THEREON. A COURT OF EQUITY COULD NOT ENTERTAIN JURISDICTION IN SUCH A CONTINGENCY, NEITHER COULD THE COMMISSION MAKE AN ADJUDICATION OR ORDER DECLARING INVALID THE JOINT TARIFF AGREEMENT AND THUS AFFECTING RIGHTS OF PARTIES WHO WERE NOT BEFORE THE COMMISSION.

The above proposition would seem to be self-evident. If, as suggested by the lower court, the routing provision was agreed upon for the purpose of effectuating a division of the traffic among connecting carriers claimed to be unlawful, it would evidently appear that such connecting carriers were vitally interested in such question and would be affected by the decision and order of the commission, especially when made conclusive and enforced by decree of court. The order of the commission was of an injunctive nature, essentially modifying the joint agreement between the carriers. If the commission proposed to make an order of an injunctive nature affecting the joint contract between the carriers it certainly would have no more authority to make an adjudication concerning the validity of that contract than would a court of equity

which undertook to adjudge such contract invalid. The connecting carriers were indispensable parties to any such hearing or any such adjudication.

See,

California v. *So. Pac. Co.*, 157 U. S., 229, 249, 251.

U. S. v. *Nor. Pac. R. R. Co.*, 134 Fed., 715 (C. C. A., 8th Circuit).

Minn. v. *Nor. Sec. Co.*, 184 U. S., 199.

Cons. Water Co. v. *City of San Diego*, 93 Fed., 849 and 852.

Western N. Y. R. R. v. *Penn. Refg. Co.*, 137 Fed., 358.

It goes to the very root of the power of a court or any tribunal to make a decree or order which will necessarily affect the rights of parties not before the court. As the connecting carriers would not be bound by the decision of the commission or the lower court, but the initial carriers would be by the decree of the court they would be placed in a precarious position by reason of such a ruling. This objection was raised on demurrer (See Record, pp. 87 and 88), but overruled by the court. (See Record, pp. 1017, 1018 and 1019.)

It is also necessarily involved in the validity of the order of the commission, and the decree of the lower court. As such order was invalid by reason of that defect of parties, the decree of the court was erroneous in enforcing the same. The case relied upon by the lower court of *Int. Com. Com.* v. *T. & P. Ry.*, 52 Fed., 162; affirmed in 162 U. S., 205, is wholly inapplicable, as in that case the connecting carrier interested in the

through rate, only that portion of which received by the other carrier was involved, was made a party to the proceedings before the commission, and the order of the commission involved only the validity of the local rate of the Texas and Pacific Railway Company, the defendant, as compared with the proportion of the through rate received by it. In such question the connecting carrier was not interested, but in any event had been accorded a hearing. The lower court assumed that as defendants were wrongdoers it was immaterial that other participants in the alleged wrongful acts were not made parties to the proceeding. All of which is begging the question. Defendants could not be regarded as wrongdoers if there was no illegal arrangement between competing connecting carriers to which defendants were also parties. Neither commission nor court had the power to adjudicate as illegal and restrain the carrying out of a joint contract without having before it all the parties to such contract, and giving them an opportunity to be heard upon that question. That was essentially the doctrine in *Minn.* v. *Northern Sec. Co., supra, U. S.* v. *Northern Pac. Co. et al., supra,* and *Calif.* v. *So. Pac., supra.* The commission seem to have evolved quite an anomolous body of law and mode of practice in recent years.

Conclusion.

The order of the commission should not be enforced because,—

1. The assumption of the initial carrier of the right to route, and the denial of the same to shippers, is not

anything done or omitted to be done in violation of the Interstate Commerce Law and is therefore a matter over which the Commission has no jurisdiction.

2. The order of the Commission is in part based upon an erroneous conclusion arising from a misconstruction of Section 6 of that statute, and is therefore unlawful.

3. The order of the Commission is in part based upon an erroneous conclusion founded upon a misconstruction of Section 3 of that law and is therefore unlawful.

4. The conclusion of the Commission in respect to any question of undue preference was contrary to the evidence or findings in the case; moreover, there was no specific instance of any undue preference found or pointed out in the report of the commission.

5. The order of the Commission was not even responsive to any conclusion made by the commission on the subject of undue preference. It is not limited in its operation, so as to be applicable to any case of undue preference.

6. The order of the Commission is based upon an erroneous conclusion of the Commission that this business was so routed by the defendants as to carry out a supposed arrangement between connecting carriers not defendants for a division of this traffic. Such conclusion is without support in the evidence or findings of fact in the report. The Commission merely concluded that there was some arrangement not stated between connecting lines not defendants and therefore presumably between all the connecting lines for a division of tonnage. The conclusion was vague, indefinite

and misleading, and showed no violation of the statute.

7. The finding and ruling of the lower court that defendants were violating Section 5 of the statute is contrary to the testimony before the court and such conclusion is wholly unwarranted and unfounded in fact.

8. Neither the order of the Commission nor the decree of the court would be responsive or appropriate to a conclusion or finding of a violation of the pooling clause of the statute by the connecting carriers. It was not limited in its scope or operation to prohibiting any such violation.

9. There is no warrant in law for the contention that the carrier, when it chooses to make rates beyond its own line by joint agreement with connecting carriers, may not select the connecting agency of transportation, particularly when it makes the selection of such agency the condition of and the consideration for its undertaking, to the shipper's advantage, to do what the law does not require and the shipper could not demand.

10. The decision and order of the Commission was invalid because it undertook to adjudicate the validity of a joint agreement with connecting lines and to enjoin the carrying out of the provisions thereof by the initial lines without making the connecting lines parties to the proceeding and without affording them an opportunity to be heard on the question of the invalidity of their agreement before the same was so determined or adjudged by the Commission. As connecting lines would be indispensable parties to any such determination, the conclusion and order of the commission modi-

fying the agreement was unauthorized, unwarranted and contrary to principles of justice.

As it is obvious that the lower court not only misconstrued the 5th section of the Interstate Commerce Law but also misconstrued and misapplied the evidence before it and as all the evidence both before the commission and the court showed that the sole object of the initial carriers was to comply with the Interstate Commerce Law and by the method adopted to prevent or check connecting lines from paying to the shippers unlawful rebates in violation of that law, it would be unjust and inequitable to take from the defendants the only means in their power to force other carriers to obey the provisions of that law.

Any decree which would afford the complainants before the commission, who only complained when they were deprived of their unlawful rebates, an opportunity to again indulge in their unlawful practices would be contrary to the principles of justice and should not be sustained.

We respectfully submit the decree of the lower court should be reversed and the bill or petition of the Interstate Commerce Commission should be dismissed.

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